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United Nations

Report of the International Law Commission

Fifty-fourth session
(29 April-7 June and 22 July-16 August 2002)

General Assembly
Official Records
Fifty-seventh session
Supplement No. 10 (A/57/10)

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2002.*

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CHAPTER I

INTRODUCTION

1. The International Law Commission held the first part of its fifty-fourth session from 29 April to 7 June 2002 and the second part from 22 July to 16 August 2002 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Enrique Candioti, Second Vice-Chairman of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain Al-Baharna (Bahrain)
Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique J.A. Candioti (Argentina)
Mr. Choung Il Chee (Republic of Korea)
Mr. Pedro Comissario Afonso (Mozambique)
Mr. Riad Daoudi (Syrian Arab Republic)
Mr. Christopher John Robert Dugard (South Africa)
Ms. Paula Escarameia (Portugal)
Mr. Salifou Fomba (Mali)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. Maurice Kamto (Cameroon)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Fathi Kemicha (Tunisia)
Mr. Martti Koskenniemi (Finland)
Mr. Valery Kuznetsov (Russian Federation)
Mr. William Mansfield (New Zealand)
Mr. Djamchid Momtaz (Islamic Republic of Iran)
Mr. Bernd H. Niehaus (Costa Rica)

Mr. Didier Opertti Badan (Uruguay)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Victor Rodríguez Cedeño (Venezuela)
Mr. Robert Rosenstock (United States)
Mr. Bernardo Sepúlveda (Mexico)
Mr. Bruno Simma (Germany)
Mr. Peter Tomka (Slovakia)
Ms. Hanqin Xue (China)
Mr. Chusei Yamada (Japan)

3. At its 2711th meeting on 29 April 2002 the Commission elected Mr. Peter C.R. Kabatsi (Uganda) to fill the casual vacancy caused by the demise of Mr. Adegoke Ajibola Ige.

4. The Commission expressed satisfaction that the elections for the current quinquennium included women as members. Noting the number of women of recognized competence in international law, the Commission anticipated that this fact was likely to be reflected in the nomination and election process for the next and subsequent quinquennia.

B. Officers and Enlarged Bureau

5. At its 2711th meeting on 29 April 2002, the Commission elected the following officers:

Chairman:	Mr. Robert Rosenstock
First Vice-Chairman:	Mr. Enrique Candioti
Second Vice-Chairman:	Mr. James L. Kateka
Chairman of the Drafting Committee:	Mr. Chusei Yamada
Rapporteur:	Mr. Valery Kuznetsov

6. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

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[1] Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. P.C.R. Kabatsi, Mr. A. Pellet, Mr. P.S. Rao and Mr. C. Yamada.

[2] Mr. Ch.J.R. Dugard, Mr. G. Gaja, Mr. A. Pellet, Mr. V. Rodríguez Cedeño and Mr. C. Yamada.

7. On the recommendation of the Enlarged Bureau the Commission set up a Planning Group composed of the following members: Mr. E. Candioti (Chairman), Mr. E.A. Addo, Mr. A.M.F. Al-Marri, Mr. J.C. Baena Soares, Mr. I. Brownlie, Mr. Ch. Il Chee, Mr. P. Comissario Afonso, Ms. P. Escarameia, Mr. S. Fomba, Mr. Z. Galicki, Mr. J. L. Kateka, Mr. F. Kemicha, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. D. Momtaz, Mr. B.H. Niehaus, Mr. D. Opertti Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. P. Tomka and Mr. V. Kuznetsov (ex-officio).

C. Drafting Committee

8. At its 2712th and 2721st meetings on 5 June, 30 April and 17 May 2002 respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) Diplomatic Protection: Mr. C. Yamada (Chairman), Mr. Ch.J.R. Dugard (Special Rapporteur), Mr. I. Brownlie, Mr. E. Candioti, Mr. C. Chee, Mr. P. Comissario Afonso, Mr. R. Daoudi, Mr. G. Gaja, Mr. Z. Galicki, Mr. D. Momtaz, Mr. V. Rodríguez Cedeño, Mr. R. Rosenstock, Mr. B. Simma, Ms. H. Xue and Mr. V. Kuznetsov (ex-officio).

(b) Reservations to treaties: Mr. C. Yamada (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. P. Comissario Afonso, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. M. Kamto, Mr. F. Kemicha, Mr. M. Koskenniemi, Mr. B. Simma, Mr. P. Tomka, Ms. H. Xue and Mr. V. Kuznetsov (ex-officio).

9. The Drafting Committee held a total 15 meetings on the two topics indicated above.

D. Working Groups

10. At its 2717th meeting on 8 May 2002 the Commission also established the following Working Groups and Study Group composed of the members indicated:

(a) Working Group on International liability for injurious consequences arising out of acts not prohibited by international law: Mr. P.S. Rao (Chairman), Mr. J.C. Baena Soares, Mr. I. Brownlie, Mr. E. Candioti, Mr. Ch. Il Chee, Mr. P. Comissario Afonso, Ms. P. Escarameia, Mr. Z. Galicki, Mr. M. Kamto, Mr. J.L. Kateka, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. D. Opertti Badan, Mr. R. Rosenstock, Ms. H. Xue, Mr. C. Yamada and Mr. V. Kuznetsov (ex-officio).

(b) Working Group on Responsibility of international organizations: Mr. G. Gaja (Chairman), Mr. J.C. Baena Soares, Mr. I. Brownlie, Mr. E. Candioti, Mr. R. Daoudi, Ms. P. Escarameia, Mr. S. Fomba, Mr. M. Kamto, Mr. J.L. Kateka, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. B. Simma, Mr. P. Tomka, Mr. C. Yamada and Mr. V. Kuznetsov (ex-officio).

(c) Study Group on the Fragmentation of international law: Mr. B. Simma (Chairman), Mr. E.A. Addo, Mr. I. Brownlie, Mr. E. Candioti, Mr. Ch.J.R. Dugard, Ms. P. Escarameia, Mr. G. Gaja, Mr. Z. Galicki, Mr. M. Kamto, Mr. J.L. Kateka, Mr. F. Kemicha, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. D. Momtaz, Mr. B. Niehaus, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. P.S. Rao, Mr. R. Rosenstock, Mr. B. Sepúlveda, Mr. P. Tomka, Ms. H. Xue, Mr. C. Yamada and Mr. V. Kuznetsov (ex-officio).

11. On 1 May 2002 the Planning Group established a Working Group on the Long-term programme of work which was composed of the following members: Mr. A. Pellet (Chairman), Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. M. Kamto, Mr. M. Koskenniemi, Ms. H. Xue and Mr. V. Kuznetsov (ex-officio).

E. Secretariat

12. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis, Senior Legal Officer served as Senior Assistant Secretary, Mr. Renan Villacis, Legal Officer and Mr. Arnold Pronto, Associate Legal Officer, served as Assistant Secretaries to the Commission.

F. Agenda

13. At its 2711th meeting, on 29 April 2002, the Commission adopted an agenda for its fifty-fourth session which, together with items which were added subsequently, consisted of the following items:[3]

1. Filling of a casual vacancy.
2. Organization of work of the session.

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[3] See chapter X, paragraphs 517-519.

3. Reservations to treaties.
4. Diplomatic protection.
5. Unilateral acts of States.
6. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities.
7. Responsibility of international organizations.
8. Fragmentation of international law: difficulties arising from the diversification and expansion of international law.
9. Shared Natural Resources.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Cooperation with other bodies.
12. Date and place of the fifty-fifth session.
13. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-FOURTH SESSION

14. With regard to the topic of "Reservations to treaties", the Commission adopted 11 draft guidelines dealing with formulation and communication of reservations and interpretative declarations. The Commission also considered the Special Rapporteur's seventh report[4] and referred 15 draft guidelines dealing with withdrawal and modification of reservations to the Drafting Committee (Chapter IV).

15. As regards the topic "Diplomatic protection", the Commission considered the remaining portions of the Special Rapporteur's second report[5] relating to the exhaustion of local remedies rule, namely articles 12 and 13, as well as the third report[6] covering draft articles 14 to 16, dealing with the exceptions to that rule, the question of the burden of proof and the so-called Calvo clause, respectively. The Commission also undertook a general discussion, inter alia, on the scope of the study and held several open-ended Informal Consultations on the issue of the diplomatic protection of crews and that of corporations and shareholders. The Commission further adopted articles 1 to 7 [8] on the recommendation of the Drafting Committee. It also referred to the Drafting Committee draft articles 14 (a), (b), (c) and (d) (both to be considered in connection with paragraph (a)), and (e), concerning futility, waiver and estoppel, voluntary link, territorial connection and undue delay, respectively (Chapter V).

16. As regards the topic "Unilateral acts of States", the Commission considered part of the fifth report of the Special Rapporteur.[7] In his report, the Special Rapporteur reviewed the progress made thus far on the topic and presented revised draft article 5 (a) to (h) on the invalidity of a unilateral act, as well as articles (a) and (b) on interpretation. In addendum 2 of

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[4] A/CN.4/526 and Add.1-3.

[5] A/CN.4/514 and Corr.1.

[6] A/CN.4/523 and Add.1.

[7] A/CN.4/525 and Add.1, Add.2 and Corr.1 and Corr.2 (Arabic and English only).

his report, which the Commission did not consider, he proposed draft article 7 on *Acta sunt servanda*, draft article 8 on non-retroactivity, draft article 9 on territorial application, as well as a structure for the draft articles (Chapter VI).

17. With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law" (International liability in case of loss from transboundary harm arising out of hazardous activities), the Commission decided to resume the study of the second part of the topic and to establish a working group to consider the conceptual outline of the topic. The report of the Working Group, which was adopted by the Commission, set out some initial understandings and presented views on the scope of the endeavour, as well as on the approaches which could be pursued. The Commission also appointed Mr. P.S. Rao as Special Rapporteur for the topic (Chapter VII).

18. Concerning the topic "Responsibility of international organizations", the Commission decided to include the topic in its programme of work and established a working group to consider, inter alia, the scope of the topic. It further appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. The Commission subsequently adopted the report of the Working Group, and approved its recommendation that the Secretariat approach international organizations with a view to collecting relevant materials on the topic (Chapter VIII).

19. With regard to the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", the Commission decided to include the topic in its programme of work and established a study group. It subsequently adopted the report of the study group thus, inter alia, approving the proposed change of the title of the topic from "The risks ensuing from the fragmentation of international law" to the current title, as well as the recommendation that the first study to be undertaken will be on the issue entitled "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" (Chapter IX).

20. The Commission also decided to include in its programme of work the topic of "Shared Natural Resources" and appointed Mr. Chusei Yamada as Special Rapporteur. The Commission further recommended the establishment of a working group.

21. The Commission set up the Planning Group to consider its programme, procedures and working methods. The Commission adopted a work-programme for the current quinquennium to guide its consideration of topics on its agenda (Chapter X, section A).

22. The Commission continued traditional exchanges of information with the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization, the International Court of Justice and the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law (Chapter X, section C).

23. A training seminar was held with 24 participants of different nationalities (Chapter X, section E).

24. The Commission decided that its next session be held at the United Nations Office in Geneva in two parts, from 5 May to 6 June and from 7 July to 8 August 2003 (Chapter X, section B).

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

25. In response to paragraph 13 of General Assembly resolution 56/82 of 12 December 2001, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. Reservations to treaties

26. The Commission would welcome comments from Governments on the following issues:

(*a*) In paragraph 4 of draft guideline 2.1.6, adopted this year on first reading, the Commission considered that the communication of a reservation to a treaty could be made by electronic mail or facsimile, but that, in such a case, the reservation must be confirmed in writing. With a view to the second reading of the draft guidelines, the Commission would like to know whether this provision reflects the usual practice and/or seems appropriate.

(*b*) In his seventh report, the Special Rapporteur on reservations to treaties proposed the adoption of draft guideline 2.5.X, which reads:

> *"2.5.X Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*
>
> *The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.*
>
> *Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation."*

Following the discussions in the Commission, the Special Rapporteur withdrew this proposal, which does not relate primarily to the question of the withdrawal of reservations. As the problem will necessarily be discussed again when the Commission comes to deal with the question of the consequences of the inadmissibility of a reservation or when it reconsiders its 1997 preliminary conclusions, the Commission would welcome comments by States on this point.

B. Diplomatic protection

27. The Commission would welcome the views of Governments as to whether protection given to crew members who hold the nationality of a third State[8] is a form of protection already adequately covered by the 1982 Law of the Sea Convention or whether there is a need for the recognition of a right to diplomatic protection vested in the State of nationality of the ship in such cases? If so, would similar arguments apply to the crew of aircraft and spacecraft?

28. In the *Barcelona Traction* case, the International Court of Justice held that the State in which a company is incorporated and where the registered office is located is entitled to exercise diplomatic protection on behalf of the company. The State of nationality of the shareholders is not entitled to exercise diplomatic protection, except, possibly, where:

(*a*) The shareholders' own rights have been directly injured;

(*b*) The company has ceased to exist in its place of incorporation;

(*c*) The State of incorporation is the State responsible for the commission of an internationally wrongful act in respect of the company.

Should the State of nationality of the shareholders be entitled to exercise diplomatic protection in other circumstances? For instance, should the State of nationality of the majority of shareholders in a company have such a right? Or should the State of nationality of the majority of the shareholders in a company have a secondary right to exercise diplomatic protection where the State in which the company is incorporated refuses or fails to exercise diplomatic protection?

C. Unilateral acts of States

29. The Commission once again encourages States to reply to the questionnaire of 31 August 2001, which invited States to provide information regarding State practice on unilateral acts.[9]

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[8] See *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, Judgement of 1 July 1999.

[9] http://www.un.org/law/ilc/sessions/53/53sess.htm.

D. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

30. The Commission would welcome comments on the different points raised in the report of the Working Group (Chapter VII), particularly with regard to the following issues:

(*a*) The degree to which the innocent victim should participate, if at all, in the loss;

(*b*) The role of the operator in sharing the loss;

(*c*) The role of the State in sharing the loss, including its possible residual liability;

(*d*) Whether particular regimes should be established for ultra-hazardous activities;

(*e*) Whether the threshold for triggering the application of the regime on allocation of loss caused should be "significant harm", as in the case of the articles on prevention, or whether a higher threshold should be determined;

(*f*) The inclusion of the harm caused to the global commons within the scope of the current endeavour;

(*g*) Models which could be used to allocate loss among the relevant actors;

(*h*) Procedures for processing and settling claims of restitution and compensation, which may include inter-State or intra-State mechanisms for the consolidation of claims, the nature of available remedies, access to relevant forums and the quantification and settlement of claims.

E. Responsibility of international organizations

31. The Commission would welcome comments on the proposed scope and orientation of the study on the responsibility of international organizations. In particular, the views of Governments are sought as to:

(*a*) Whether the topic, in accordance with the approach taken in the draft articles on Responsibility of States for internationally wrongful acts, should be limited to issues relating to the responsibility for internationally wrongful acts under general international law; and

(*b*) Whether it would be preferable, as is being proposed, to limit the study to intergovernmental organizations, at least at the initial stage, as opposed to also considering other types of international organizations.

CHAPTER IV

RESERVATIONS TO TREATIES

A. Introduction

32. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

33. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[10]

34. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[11]

35. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[12] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice is concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

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[10] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[11] A/CN.4/470 and Corr.1.

[12] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

36. In 1995, the Commission, in accordance with its earlier practice,[13] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[14]

37. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic.[15] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[16] Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

38. At its forty-ninth session, the Commission again had before it the second report of the Special Rapporteur on the topic.

39. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[17]

40. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments

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[13] See *Yearbook ... 1993,* vol. II (Part Two), para. 286.

[14] As of 27 July 2000, 33 States and 24 international organizations had answered the questionnaire.

[15] A/CN.4/477 and Add.1.

[16] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[17] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

41. At its fiftieth session, the Commission had before it the Special Rapporteur's third report on the topic,[18] which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.[19]

42. At the fifty-first session, the Commission again had before it the part of the Special Rapporteur's third report which it had not had time to consider at its fiftieth session and his fourth report on the topic.[20] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted in 1996 attached to his second report,[21] was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.[22]

43. The Commission also, in the light of the consideration of interpretative declarations, adopted a new version of draft guideline 1.1.1 [1.1.4] and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

44. At the fifty-second session, the Commission had before it the Special Rapporteur's fifth report on the topic,[23] dealing, on the one hand, with alternatives to reservations and interpretative declarations and, on the other hand, with procedure regarding reservations and interpretative declarations, particularly their formulation and the question of late reservations and interpretative

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[18] A/CN.4/491 and Corr.1 (English only), A/CN.4/491/Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (Chinese, French and Russian only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1.

[19] See Report of the International Law Commission on the work of its fiftieth session, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 540.

[20] A/CN.4/499.

[21] A/CN.4/478/Rev.1.

[22] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 470.

[23] A/CN.4/508/Add.1 to 4.

declarations. At the same session, the Commission provisionally adopted five draft guidelines.[24] The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur contained in documents A/CN.4/508/Add.3 and Add.4 to the following session.

45. At the fifty-third session, the Commission initially had before it the second part of the fifth report (A/CN.4/508/Add.3 and Add.4) relating to questions of procedure regarding reservations and interpretative declarations and then the Special Rapporteur's sixth report (A/CN.4/518 and Add.1 to 3) relating to modalities for formulating reservations and interpretative declarations (including their form and notification) as well as the publicity of reservations and interpretative declarations (their communication, addressees and obligations of depositaries).

46. At the same session the Commission provisionally adopted 12 draft guidelines.[25]

47. At the same session, at its 2692nd meeting, held on 19 July 2001, the Commission decided to refer to the Drafting Committee draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.3 (Competence to formulate a reservation at the international level), 2.1.3 bis (Competence to formulate a reservation at the internal level), 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), 2.1.5 (Communication of reservations), 2.1.6 (Procedure for communication of reservations), 2.1.7 (Functions of depositaries), 2.1.8 (Effective date of communications relating to reservations), 2.4.1 (Formulation of interpretative declarations), 2.4.1 bis (Competence to formulate an interpretative declaration at the internal level), 2.4.2 (Formulation of conditional interpretative declarations) and 2.4.9 (Communication of conditional interpretative declarations).

B. Consideration of the topic at the present session

48. At the present session, the Commission had before it the Special Rapporteur's seventh report (A/CN.4/526 and Add.1 to 3) relating to the formulation, modification and withdrawal of reservations and interpretative declarations. It considered the report at its 2719th, 2720th and 2721st meetings, on 14, 15 and 17 May 2002.

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[24] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 470.

[25] *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), para. 114.

49. At its 2721st meeting, on 17 May 2002, further to consideration of the first part of the seventh report (A/CN.4/526), the Commission decided to refer to the Drafting Committee draft guideline 2.1.7 bis (Case of manifestly impermissible reservations).

50. At its 2733rd and 2734th meetings, on 22 and 23 July 2002, the Commission considered and provisionally adopted draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.3 (Formulation of a reservation at the international level), 2.1.4 [2.1.3 bis, 2.1.4],[26] (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), 2.1.5 (Communication of reservation), 2.1.6 [2.1.6, 2.1.8] (Procedure for communication of reservations), 2.1.7 (Functions of depositories), 2.1.8 [2.1.7 bis] (Procedure in case of manifestly [impermissible] reservations),[27] 2.4.1 (Formulation of interpretative declarations), [2.4.2 [2.4.1 bis] (Formulation of an interpretative declaration at the internal level)], [2.4.7 [2.4.2, 2.4.9] (Formulation and communication of conditional interpretative declarations)].[28]

51. At its 2748th meeting on 14 August 2002, the Commission adopted the commentaries to the aforementioned draft guidelines.

52. The text of these draft guidelines and the commentaries thereto are reproduced in section C.2 below.

(a) Introduction by the Special Rapporteur of his seventh report

53. The Special Rapporteur drew attention to section C of his seventh report (A/CN.4/526, paras. 48-55) and, in particular, to two new developments involving reservations to human rights treaties. The first was the important report prepared by the Secretariat in 2001 at the request of the Committee on the Elimination of Discrimination against Women, specifically the section entitled "Practices of human rights treaty bodies". Those bodies had proved to be much more pragmatic, less dogmatic, than the text of General Comment No. 24 might suggest. They were

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[26] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

[27] The term will be reviewed by the Commission.

[28] The two draft guidelines are in square brackets pending a decision by the Commission on the fate of all of the draft guidelines on conditional interpretative declarations.

more inclined to encourage States to withdraw certain reservations than to appreciate their validity, something that was relevant in the light of the Commission's preliminary conclusions, adopted in 1997, on reservations to normative multilateral treaties, including human rights treaties.

54. The second development was that, despite the continuing opposition of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights had renewed its earlier decision to entrust Ms. Françoise Hampson with the preparation of a working paper on reservations to human rights treaties. The Special Rapporteur requested the members of the Commission to express their views on whether to get in touch with Ms. Hampson in the hope that there would be fuller consultations between the International Law Commission, the Sub-Commission and other human rights treaty bodies with a view to the re-examination in 2004 of the preliminary conclusions adopted by the International Law Commission in 1997.

55. Referring to the draft guidelines in the second and third addenda to his seventh report, the Special Rapporteur introduced draft guideline 2.5.1,[29] which reproduced article 22, paragraph 1, of the 1986 Vienna Convention, which itself was virtually identical to the corresponding provision of the 1969 Vienna Convention. The *travaux préparatoires* of article 22, paragraph 1, adequately demonstrated that the withdrawal of a reservation was a unilateral act, thus ending a controversy as to the nature of that act. The argument that a reservation not provided for by a treaty was effective only if the parties to the treaty accepted it was overly formalistic and failed to take account of the fact that the provision of the Vienna Conventions had become a customary rule.

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[29] The draft guideline reads as follows:

> 2.5.1 *Withdrawal of reservations*
>
> Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

A/CN.4/526/Add.2, para. 85.

56. Draft guideline 2.5.2,[30] reproduced the text of article 23, paragraph 4, of the Vienna Conventions. Its most important implication was that there could be no "implicit" or "tacit" withdrawal of reservations, despite the theory that the non-confirmation of a reservation could constitute its "withdrawal".

57. Similarly, withdrawal could not be confused with "expired" or "forgotten" reservations, the latter arising primarily from the amendment or repeal of the internal legislation of a State which made the reservation unnecessary. Such a situation could give rise to legal problems as to whether internal law or international law took precedence; the "forgotten" reservation was nevertheless not withdrawn.

58. Draft guideline 2.5.3[31] corresponded to the need to include in the Guide to Practice, particularly in view of its non-binding nature as a "code of recommended practice", a guideline that would encourage States to undertake a periodic review of their reservations precisely in order to see if they were no longer justified in view of developments in their internal legislation. That also corresponded to the practice of the United Nations General Assembly and the Council of Europe and that of the bodies established by certain treaties.

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[30] The draft guideline reads as follows:

> 2.5.2 *Form of withdrawal*
>
> The withdrawal of a reservation must be formulated in writing.

A/CN.4/526/Add.2, para. 90.

[31] The draft guideline reads as follows:

> 2.5.3 *Periodic review of the usefulness of reservations*
>
> States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer answer their purpose.
>
> In such a review, States and international organizations should devote particular attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give careful consideration to the usefulness of the reservations in relation to their internal legislation and to developments in that legislation since the reservations were formulated.

A/CN.4/526/Add.2, para. 103.

59. Draft guideline 2.5.4[32] was an attempt to provide an answer to the difficult question of what the effect should be if a monitoring body found a reservation to be impermissible.[33] Obviously, such a finding could not constitute withdrawal per se. It should, however, have consequences: either it could be considered to have "neutralized" the reservation or, in conformity with the Commission's preliminary conclusions of 1997, it would be the responsibility of the reserving State to draw conclusions from the finding. If full withdrawal might sometimes seem excessively radical, partial withdrawal remained an option. Draft guideline 2.5.X[34] was a combination of the two alternatives.

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[32] The draft guideline reads as follows:

> 2.5.4 *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*
>
> The fact that a reservation is found impermissible by a body monitoring the implementation of a treaty to which the reservation relates does not constitute the withdrawal of that reservation.
>
> Following such a finding, the reserving State or international organization must act accordingly. It may fulfil its obligations in that respect by withdrawing the reservation.

A/CN.4/526/Add.2, para. 114.

[33] This term will have to be re-examined in future, in the light of future reports by the Special Rapporteur and discussions in the Commission.

[34] The draft guideline reads as follows:

> 2.5.X *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*
>
> The fact that a reservation is found impermissible by a body monitoring the implementation of a treaty to which the reservation relates does not constitute the withdrawal of that reservation.
>
> Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that regard by totally or partially withdrawing the reservation.

A/CN.4/526/Add.3, para. 216.

60. Draft guidelines 2.5.5 to 2.5.5 ter[35] related to the procedure for the withdrawal of reservations, on which the Vienna Conventions were silent. The Special Rapporteur thought that

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[35] The draft guidelines read as follows:

[2.5.5 *Competence to withdraw a reservation at the international level*

Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to withdraw a reservation on behalf of such State or international organization.]

[2.5.5 *Competence to withdraw a reservation at the international level*

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation on behalf of a State or an international organization if:

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

[(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization].]

they could be modelled on the procedure for the formulation of reservations, to the extent that it could apply to withdrawal. In view of the amendments that the Commission had already made to the guidelines relating to the formulation of reservations, it would be appropriate to make similar amendments to those relating to the withdrawal of reservations. Another possibility would be to include a single draft guideline 2.5.5,[36] reproducing, mutatis mutandis, the guidelines relating to the procedure for the formulation of reservations. The latter option was not, however, favoured by the Special Rapporteur, partly because it did not address the practical needs that the Guide was meant to meet and partly because the two procedures - formulation and withdrawal - were not identical. As for the guidelines relating to the communication of the withdrawal of

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2.5.5 bis *Competence to withdraw a reservation at the internal level*

> The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or international organization.

2.5.5 ter *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

> A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

A/CN.4/526/Add.2, para. 139.

[36] The draft guideline reads as follows:

[2.5.5 *Competence to withdraw a reservation*

> The determination of the competent body and the procedure to be followed for withdrawing a reservation are governed, mutatis mutandis, by the rules applying to the formulation of reservations, given in guidelines 2.1.3, 2.1.3 bis and 2.1.4.]

reservations (2.5.6, 2.5.6 bis and 2.5.6 ter),[37] the Special Rapporteur recalled that the *travaux préparatoires* of the 1969 Vienna Convention showed that the members of the Commission at that time thought that the same procedure should be applied by the depositary both to the communication of reservations and to their withdrawal. That was confirmed by practice, which the guidelines reflected.

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[37] These draft guidelines read as follows:

> [2.5.6 *Communication of withdrawal of a reservation*
>
> The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.]
>
> [2.5.6 *Communication of withdrawal of reservations*
>
> The withdrawal of a reservation must be communicated [in writing] to the contracting States and contracting organizations and other States and other international organizations entitled to become parties to the treaty.
>
> The withdrawal of a reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.
>
> [2.5.6 bis *Procedure for communication of withdrawal of reservations*
>
> Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to the withdrawal of a reservation to a treaty shall be transmitted:
>
> (i) If there is no depositary, directly by the author of the withdrawal to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or
>
> (ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.
>
> Where a communication relating to the withdrawal of a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].
>
> 2.5.6 ter *Functions of depositaries*
>
> The depositary shall examine whether the withdrawal by a State or an international organization of a reservation to a treaty is in due and proper form.

61. Draft guidelines 2.5.7 and 2.5.8[38] dealt with the effect of the withdrawal of a reservation and appeared in the section of the Guide to Practice relating to procedure simply for reasons of convenience. With regard to draft guideline 2.5.7, the Special Rapporteur said that it was not

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> In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:
>
> (*a*) The signatory States and organizations and the contracting States and contracting organizations; or
>
> (*b*) Where appropriate, the competent organ of the international organization concerned.]

A/CN.4/526/Add.2, paras. 150-151.

[38] The draft guidelines read as follows:

> 2.5.7 *Effect of withdrawal of a reservation*
>
> The withdrawal of a reservation entails the application of the treaty as a whole in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted or objected to the reservation.
>
> 2.5.8 *Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization*
>
> The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization.

A/CN.4/L.526/Add.2, para. 184.

altogether accurate to say "The withdrawal of a reservation entails the application of the treaty as a whole …", inasmuch as there could be other reservations which would not be withdrawn and would continue to prevent the application of the treaty as a whole. It would therefore be better to reword the first sentence to read: "The withdrawal of a reservation entails the application in its entirety of the treaty provision to which the reservation related …".

62. With regard to the date on which the withdrawal of a reservation took effect (draft guideline 2.5.9[39]), the Special Rapporteur drew attention to article 22, paragraph 3, of the Vienna Convention but said that such a date could cause problems for the adaptation of internal law to the new situation, although there was always the possibility of adopting express clauses to deal with the problem. That was why he had found it useful to include in the Guide to Practice some model clauses[40] which States could include in treaties into which they entered. If the model

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[39] This draft guideline reads as follows:

> 2.5.9 *Effective date of withdrawal of a reservation*
>
> Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

A/CN.4/526/Add.2, para. 175.

[40] The model clauses read as follows:

> Model clause A - Deferment of the effective date of the withdrawal of a reservation
>
> A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [depositary].
>
> Model clause B - Earlier effective date of withdrawal of a reservation
>
> A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the date of receipt of such notification by [depositary].

clauses were referred to the Drafting Committee, a decision would have to be taken on whether they should be reproduced following the text of draft guideline 2.5.9 or whether they should appear in an annex to the Guide to Practice, a solution that seemed more appropriate to him.

63. Nothing would prevent the State or the international organization that withdrew its reservation from setting the effective date of that withdrawal at a date later than one on which it received notification, as recalled in draft guideline 2.5.10.[41] The draft guideline also dealt with the case where the withdrawal did not affect the obligations of the contracting States or international organizations when those were "integral" obligations. In that case, the withdrawal had an immediate or even a retroactive effect.

> Model clause C - Freedom to set the effective date of withdrawal of a reservation
>
> A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [depositary].

A/CN.4/526/Add.2, paras. 164 and 166.

[41] The draft guideline reads:

> 2.5.10 *Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation*
>
> The withdrawal of a reservation takes effect on the date set by the withdrawing State where:
>
> (*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or
>
> (*b*) The withdrawal does not alter the situation of the withdrawing State in relation to the other contracting States or international organizations.

A/CN.4/526/Add.2, para. 169.

64. Draft guidelines 2.5.11 and 2.5.12[42] related to the partial withdrawal[43] of reservations, which was very similar to the total withdrawal of reservations because by "diminishing" or reducing the scope of a reservation, the State (or the international organization) "increased" its treaty obligations.

65. The definition of partial withdrawal proposed in draft guideline 2.5.11[44] showed that such withdrawal was a modification of an existing reservation and not a total withdrawal followed by a new reservation, as seemed implicit in some theory and case law such as the decision of the Swiss Federal Court in the *Elizabeth B.* case[45] and the occasionally inconsistent practice of the Secretary-General of the United Nations acting as depositary. The same procedure should be used for the partial or the total withdrawal of a reservation. (Draft guidelines 2.5.6 to 2.5.10 could thus easily be transposed to partial withdrawal.) On the other hand, draft guidelines 2.5.7 and 2.5.8 could not be transposed because, in the case of a partial withdrawal, the reservation

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[42] The draft guidelines read:

> 2.5.11 *Partial withdrawal of a reservation*
>
> The partial withdrawal of a reservation is subject to respect for the same formal and procedural rules as a total withdrawal and takes effect in the same conditions.
>
> The partial withdrawal of a reservation is the modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty, or of the treaty as a whole, to that State or that international organization.
>
> 2.5.12 *Effect of a partial withdrawal of a reservation*
>
> The partial withdrawal of a reservation modifies the legal effects of the reservation to the extent of the new formulation of the reservation. Any objections made to the reservation continue to have effect as long as their authors do not withdraw them.

A/CN.4/526/Add.3, paras. 210 and 220.

[43] The Special Rapporteur explained that the last part of his report on the aggravation of reservations could not be introduced at the fifty-fourth session.

[44] The Special Rapporteur considered that the order of the paragraphs of draft guideline 2.5.11 could be reversed.

[45] See A/CN.4/526/Add.3, paras. 199-200.

remained in force and did not ipso facto affect the objections made to it. Draft guideline 2.5.11 defined the consequences of a partial withdrawal, while draft guideline 2.5.11 bis[46] was the "counterpart" of draft guideline 2.5.4 and could possibly be merged with it.

66. In concluding his introduction, the Special Rapporteur said he hoped that all the draft guidelines and model clauses relating to draft guideline 2.5.9 would be referred to the Drafting Committee.

(b) Summary of the debate

67. With regard to the Special Rapporteur's question about the future of contacts between the Commission and the Sub-Commission on the Promotion and Protection of Human Rights, several members supported the idea that the Commission should be available and open to bodies that dealt with the same questions and should even ask for their views. According to one opinion, the Commission should even take the initiative in respect of an informal meeting with the interested parties at the next session. In the light of the Special Rapporteur's explanations on the current situation, the Commission decided to contact the human rights bodies. A letter co-signed by the Chairman and the Special Rapporteur would therefore be sent to the Chairman of the Sub-Commission and to Ms. Hampson with an official request that opportunities for consultation should be organized during the next session in Geneva.

68. Attention was drawn to the usefulness of the set of draft guidelines, which were designed to give States practical guidance, particularly in view of the absence or scarcity of indications concerning the procedure to be followed in the event of the withdrawal or modification of reservations in the Vienna Conventions and other conventions. It was also noted that emphasis should be placed on general treaty practice rather than on certain sectors or certain regions.

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[46] The draft guideline reads:

> 2.5.11 bis *Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*
>
> Where a body monitoring the implementation of the treaty to which the reservation relates finds the reservation to be impermissible, the reserving State or international organization may fulfil its obligations in that respect by partially withdrawing that reservation in accordance with the finding.

69. Several members expressed their support for guidelines 2.5.1 and 2.5.2, while noting that they basically repeated the relevant provisions of the Vienna Conventions (art. 22, para. 1, and art. 23, para. 4). Some members expressed doubts about including them in the Guide to Practice rather than referring to the provisions of the Vienna Conventions. However, other members stated that they were in favour of reproducing the provisions of the Vienna Conventions in the Guide to Practice, which was comprehensive in nature. Guideline 2.5.2 confirmed the need for the withdrawal of a reservation to be made in writing; that ruled out implicit withdrawals and ensured legal certainty in relations between the States parties. Consideration was also given to the fact that a reservation might fall into abeyance as a result of the subsequent practice of a reserving State. According to one opinion, other forms of withdrawal should be dealt with, such as a declaration concerning an imminent formal withdrawal, on the understanding that the relations of the reserving State with the other parties to the treaty would be modified only when the latter had received written notification of the withdrawal of the reservation. However, the reserving State would be bound from the moment it announced its intention to withdraw its reservation. It was stressed that such a declaration might have an effect at the internal level, but not in relation to the other parties. According to another opinion, great care must be taken on the question of implicit withdrawal because a withdrawal took legal effect only when it was formulated in writing. For example, in 1929, the Parliaments of Czechoslovakia and Poland adopted and their Heads of State signed a declaration accepting the jurisdiction of the Permanent Court of International Justice, which was never deposited with the depositary; the declaration therefore had no legal effect. Other members referred to the case where States made reservations and then did not insist on maintaining them in their bilateral or multilateral relations or even abandoned them for different reasons (such as a change in their internal legislation); they questioned whether States could claim that they had not withdrawn their reservation in writing in order to avoid any estoppel effect. Moreover, if the other States applied to a State the provision to which that State had made the "abandoned" reservation, that would create a de facto situation that went beyond the treaty framework. It was also pointed out that a reservation which was not formally withdrawn remained legally valid, even though it was "dormant", thereby giving the reserving State greater latitude to re-amend its internal legislation along the lines of the reservation, if necessary.

70. According to one opinion, draft guideline 2.5.3 was a creative approach to the problem of obsolete reservations. It was noted that it would also be useful to mention the appeals made by bodies monitoring the implementation of treaties, since internal legislation was at times vague and inconsistent. According to another opinion, that draft guideline could give rise to some difficulties because the review of the usefulness of reservations did not relate to procedure, but basically raised problems relating to conditions of withdrawal and the role of the obsolescence of reservations. Moreover, the result of the review of the development of internal legislation seemed rather doubtful. The nature of draft guideline 2.5.3 as a recommendation should be further emphasized so as not to give the impression that States were obliged to carry out such a review. The guideline should also not be restricted to referring to internal legislation because there could be other circumstances which would prompt a reserving State to withdraw its reservation.

71. With regard to draft guideline 2.5.4 (which several members discussed in conjunction with draft guidelines 2.5.11 bis and 2.5.X, given the close relationship between those provisions), it was pointed out that the first paragraph stated the obvious, whereas the second highlighted a case which had as its starting point the fact that a finding of impermissibility might have the effect of obliging the reserving State to withdraw the reservation. But it was far from certain that the monitoring body had the implicit power to oblige the reserving State to withdraw the reservation. It was pointed out that the preliminary conclusions adopted by the Commission in 1997 were much more guarded: there was no need to specify the consequence of the finding of impermissibility, at least in respect of the withdrawal of reservations. The question also arose whether the finding of impermissibility in the case of a mere recommendation was binding on the reserving State and it was pointed out that the State was not obliged to follow the recommendations of a monitoring body. Several members were of the opinion that careful consideration should also be given to the nature of the monitoring body formulating the finding, given that they fell into several types (political bodies, jurisdictional bodies, sui generis bodies, etc.).

72. Furthermore, there was a great difference between a decision of a jurisdictional body and findings by a monitoring body, which could entail either the "automatic" nullity of the reservation, or the obligation for the State to take measures, or could simply constitute a recommendation to the State in question to take appropriate measures. The example was cited of the former European Commission of Human Rights, whose findings created a "moral duty" for

States to reconsider their position. Even if a monitoring body had binding powers, it was not clear whether they were "self-executing". The question even arose whether a judicial body constituted a monitoring body within the meaning of the draft guideline. Furthermore, some members had doubts concerning the composition and the motivation of the findings of the monitoring bodies, the possibility of conflicting assessments by those bodies and States parties and, lastly, the possible effects of the draft guideline for the monitoring bodies themselves. The question also arose as to the source, in international law, of any "obligations" of States to act in consequence of the findings of the monitoring bodies. A distinction should be drawn between, on the one hand, the finding of impermissibility by a monitoring body and the effects of that finding, and, on the other, the impermissibility of the reservation per se. The withdrawal of the reservation found to be "impermissible" was not the only solution: there were others (withdrawal from the treaty, modification of the reservation), as was pointed out in the preliminary conclusions. One solution should not be isolated at the expense of the others, nor should just one element of paragraph 10 of the preliminary conclusions be singled out.

73. One view expressed was that the unduly peremptory and general wording of the draft guideline, which sought to combine several disparate elements and implied that the findings of all monitoring bodies had binding force without seeking to draw any distinction between them, was a source of confusion or misunderstanding: that could be rectified by a more flexible drafting. It was even suggested that the second paragraph could be deleted in its entirety. Furthermore, the fundamental role of consent must not be overlooked. A State wishing to become a party to a treaty subject to a reservation found to be impermissible could simply maintain its offer to become a party to the treaty. The claim that rejection of the reservation obliged the State to withdraw it was very different from the claim that objection to the reservation indicated that no treaty relations were entered into with the reserving State.

74. The real question was who had the power to decide on the permissibility of reservations. The regime established by the Vienna Conventions left that task to the States parties. However, recent developments in another direction, such as the case of the reservation formulated by Iceland to the International Convention for the Regulation of Whaling and the position taken by the International Whaling Commission, which conflicted with that of several States parties, would raise doubts in that regard. Reference was also made to the possibility of including a restrictive clause specifying that the Guide to Practice was without effects on the monitoring bodies' power to determine relations between the States parties to the treaty.

75. Another view expressed was that the draft guideline 2.5.4 was a mere recommendation included in the Guide to Practice and that the problems of its wording could be resolved by the Drafting Committee. The "composite" version in draft guideline 2.5.X seemed useful and clear.

76. Other members thought that the draft guideline belonged not in the section on procedure, but in another chapter of the Guide, given that the question of impermissibility of reservations had not yet been taken up. It would also be useful to envisage a draft guideline specifying the relationship between the finding by a monitoring body that the reservation was impermissible and the withdrawal of the reservation by the State or international organization concerned.

77. With respect to draft guidelines 2.5.5 and 2.5.6, lacunae were noted in the Vienna Conventions on the subject of withdrawal of reservations. It was also pointed out that the procedure concerning withdrawal of reservations should be simpler than the procedure for their formulation. Several members expressed their preference for the longer version, in the interests of ease of reference and consistency, although the view was also expressed that the shorter version might have advantages. However, it was pointed out that, once the adoption of the Guide to practice on first reading completed, the draft guidelines should be reviewed in their entirety in order to determine whether it might be desirable to use cross-references in the case of identical provisions or applicable mutatis mutandis. It was also noted that some draft guidelines (such as guideline 2.5.6 bis) should be harmonized in similar situations with the draft guidelines already adopted by the Commission.

78. It was noted that draft guidelines 2.5.7 to 2.5.10 conformed with the relevant provisions of the Vienna Conventions. On draft guideline 2.5.7, the opinion was expressed that it should reflect the case in which other reservations remained in force - so that the treaty would not be applied in its entirety as between the withdrawing State and the other States parties.

79. It was also considered that the model clauses related to draft guideline 2.5.9 were useful and should be referred to the Drafting Committee.

80. On draft guideline 2.5.11, several members supported the oral revision by the Special Rapporteur reversing the order of the guideline's paragraphs. Concern was expressed that a partial withdrawal might be used effectively to enlarge the scope of the reservation. Consequently, a clarification explaining that a partial withdrawal did not eliminate the initial reservation and did not constitute a new reservation seemed indispensable. Furthermore, it would be preferable to assimilate partial withdrawal to simple withdrawal, given the complications resulting from two separate procedures and the diverging ways in which the other

States parties could interpret it. The question was raised whether the States parties to a treaty that had not objected to the initial reservation could object to its partial withdrawal. On that question, the view was expressed that there could be no general rule and that everything depended on the effects of the partial withdrawal, which might, for example, be discriminatory. In that case, the partial withdrawal almost amounted to a new reservation. The question also arose whether the partial withdrawal of the reservation in fact constituted a modification thereof rather than, as the practice of the Secretary-General of the United Nations as depositary seemed to imply, a withdrawal followed by a new reservation. The term "modification" was used by the Secretary-General in that context to indicate the aggravation of the reservation. Accordingly, it went without saying that a partial withdrawal constituted a modification. Reference was also made to the possibility of withdrawing one among several reservations made by a State (in which case the objections to that reservation had no further purpose), or to the possibility whereby the reservation depended on the internal legislation, which might result (if the latter were amended) in a limitation of the reservation. In that case, any objections to the reservation could continue to exist inasmuch as the reservation continued to exist, albeit in a limited form.

81. With regard to draft guideline 2.5.12, the view was expressed that reference should be made to a situation in which an objection related to the part of the reservation that had been withdrawn, for, in such a case, the objection became automatically superfluous.

(c) Conclusions of the Special Rapporteur

82. At the end of the debate, the Special Rapporteur noted that all the draft guidelines relating to the formulation of reservations *lato sensu* would no doubt be extremely useful to the international community, as their purpose was to codify technical rules that responded to a real need. Furthermore, with the exception of draft guidelines 2.5.4, 2.5.11 bis and 2.5.X, which he proposed to treat separately, none of the draft guidelines had given rise to any doctrinal dispute. The debate had focused on specific points without raising problems of principle. His conclusion had been that the general sentiment was in favour of referring all the draft guidelines (except for guidelines 2.5.4, 2.5.11 bis and 2.5.X) to the Drafting Committee.

83. The Special Rapporteur reiterated that the Guide to Practice would not be a set of binding rules, but rather, a "code of recommended practices", a fact that might eventually even be reflected in its title. That characteristic did not mean that it should not be drafted rigorously and carefully, with a view to guiding State practice. Furthermore, it was clear that some rules contained in the draft guidelines were binding, not because they were included in the Guide, but

because they were customary rules or were transposed from the Vienna Conventions. That illustrated the difference between the legal value of a norm and of a source. As to the question whether the provisions of the Vienna Conventions should be incorporated word for word in the Guide to Practice, his reply was categorically in the affirmative. The value of the Guide would be seriously compromised if users did not find the answers to their questions in the Guide itself. Albeit incomplete and sometimes ambiguous, the Vienna Conventions inevitably constituted the starting point for any practice in the matter of reservations, and a Guide that ignored them would have little practical value. Furthermore, mere reference or referral to the Vienna Conventions would inevitably pose technical and legal problems (particularly for States and organizations that were not parties to the Vienna Conventions). Accordingly, it was simpler, more useful, logical and convenient to incorporate the relevant treaty provisions in the Guide in their entirety.

84. That position responded to certain proposals by members concerning drafting changes to some of the draft guidelines. The Special Rapporteur recalled that the wording of several draft guidelines reproduced word for word that of the corresponding provisions of the Vienna Conventions and that in consequence it would be unnecessary and potentially dangerous to rewrite them. He agreed in substance with members who had called for the withdrawal of reservations to be facilitated, but he could see no intermediate solution.

85. Draft guidelines 2.5.1 and 2.5.2 required the written form, thereby ensuring legal security and also reflecting the principle of parallelism of forms.

86. With particular regard to draft guideline 2.5.2, a formulation had been suggested that would oblige the State that had submitted a written notification of withdrawal of its reservation to act in line with that withdrawal even before such notification was received by the other States parties. He was not in favour of that formulation because any treaty presupposed the meeting of two or more minds on a *single* text at a given point in time. That formulation would lead to situations in which there would be a divergence of obligations in time, if only for a brief period; that would lead to unnecessary complications.

87. As to the question raised concerning the situation in which a State applies in practice the provision with regard to which it has formulated a reservation, the Special Rapporteur thought that the problem transcended the sphere of reservations to treaties and came closer to the topic of "Fragmentation of international law" or of unilateral acts. He was not convinced that the problem should be addressed in the Guide to Practice, although he would have no objection if the Commission felt that a draft guideline along those lines should be included in the Guide.

88. The Special Rapporteur was pleased to note the Commission's favourable reaction to draft guideline 2.5.3, which had met with unanimous approval. As for the wish expressed that a specific reference should be included to the treaty monitoring bodies, he wondered whether, in that case, mention should not also be made of the General Assembly and regional bodies. In any case, that proposal seemed to him unlikely to gain wide acceptance, particularly in the light of the debate in the Commission on the monitoring bodies. On the suggestion to stress the recommendatory aspect of the draft guideline, his view was that the entire Guide to Practice was a set of recommendations. As for the proposal to delete the reference to internal legislation, he thought that it was precisely such developments in internal legislation resulting in obsolete reservations that usually made a periodic review so essential.

89. He had noted the clear preference for the longer versions of draft guidelines 2.5.5 and 2.5.6. In the interests of facilitating the task of future users of the Guide to Practice, each subject should be treated separately and comprehensively therein, even at the expense of some repetition. It would be better to wait until the draft was considered on second reading before taking a position on whether or not it would be desirable to merge some of the draft guidelines or make them more concise.

90. The Special Rapporteur noted that draft guidelines 2.5.7 and 2.5.8 had attracted few comments; those that had been made mainly concerned matters of drafting. In the case of draft guideline 2.5.7, he supported the suggestion that it should specify that the withdrawal of a reservation resulted in the application of those provisions of the treaty referred to by the reservation as between the withdrawing State or organization and all other parties to the treaty.

91. In connection with draft guidelines 2.5.9 and 2.5.10, the Special Rapporteur said, with regard to a comment on draft guideline 2.5.9 concerning the effective date of a notification in international law, that in his view there was no general rule: even within the Vienna Conventions, article 20 contained rules different from those in article 22, paragraph 3.

92. As for draft guideline 2.5.10, the Special Rapporteur concurred with the comment that the withdrawal should have no effect on the obligations of the reserving State vis-à-vis the other contracting States or organizations, rather than their "situation", as the guideline currently stated.

93. With regard to draft guideline 2.5.11, the Special Rapporteur did not underestimate the risk mentioned by some members that States might try to portray an aggravated reservation as a partial withdrawal. The function of jurists, however, was precisely to establish classifications and provide definitions. In that context, the word "modification" was essential, since a withdrawal related to an existing reservation that would continue to exist. The subject at issue was not the withdrawal of a reservation followed by the formulation of a new reservation, as the inconsistent practice of the Secretary-General might suggest.

94. As for draft guideline 2.5.12, he endorsed the suggestion that it should include a reference to a situation in which an objection stood, if it was justified by the opposition of its author to the part of the reservation that had not been withdrawn. It would be sufficient to add a phrase at the end, such as "so long as the objection does not relate exclusively to the part of the reservation that has been withdrawn". The Special Rapporteur also fully appreciated the significance of the example given of the withdrawal of a reservation that had left the remaining part of the reservation discriminatory vis-à-vis a particular State or group of States. In that case, it would be legitimate for States which had fallen foul of such discrimination to formulate an objection. It was doubtful, however, whether other cases of the same kind existed; if it they did, they might be covered by adding a new paragraph to draft guideline 2.5.12 or by drafting a guideline 2.5.12 bis.[47]

95. Lastly, the Special Rapporteur took up draft guidelines 2.5.4, 2.5.11 and 2.5.X, pointing out that his comments would focus on draft guideline 2.5.X, which was a combination of the other two. He recalled that several members had said that the first paragraph stated the obvious. It had seemed important to him to make it clear that monitoring bodies could never determine the treaty commitment of a State: in other words, they could neither withdraw nor nullify a reservation. The most they could do was to find it inadmissible, even though the European Court of Human Rights had - wrongly, in his view - claimed for itself the power to nullify a reservation in the *Belilos* case. All that even the International Court of Justice might be able to do was to decline to apply an inadmissible reservation, but in that case it would need to determine whether

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[47] The Special Rapporteur read out the following wording: "No new objection may be formulated in the case of partial withdrawal of a reservation, unless the resulting reservation gives rise to new questions and the objection relates to such a question."

the reservation could be detached from the treaty, so that the treaty could apply without the reservation, or whether the inadmissibility of the reservation prevented the treaty being applied as a whole. Either way, the authority of its judgement would be restricted to the case in hand and, in the relations between the reserving State and the States other than the defendant, the reservation would continue to exist, although still inadmissible or impermissible[49] ("*illicite*" or "*non valide*").

96. The Special Rapporteur recalled that the first sentence of the second paragraph of draft guideline 2.5.X was taken from the first sentence of paragraph 10 of the 1997 Preliminary conclusions, preceded by the phrase "Following such a finding". He was still of the view that, unless it acted in bad faith, a State that was concerned to observe the law should certainly take some action to deal with an inadmissible reservation, whether or not it had been found inadmissible by a particular body. It might be possible, if necessary, to change the wording, in accordance with one suggestion, to read "it is the reserving State that has the responsibility", thus reproducing a sentence that appeared in the Preliminary conclusions.

97. The Special Rapporteur also noted that monitoring bodies established under human rights treaties often had far wider and more binding powers than simply those of making comments and recommendations. As for the International Court of Justice, moreover, he thought that, when it was called on to decide on the application of a treaty, its role was almost that of a monitoring body, contrary to what had been stated. It might, nonetheless, be better to use such wording as "bodies having competence to find a reservation inadmissible". Nor did he consider that monitoring bodies were always or exclusively political, as some had claimed.

98. The Special Rapporteur emphasized once more that he had never said that a State that had made a reservation that a body competent to do so had found inadmissible was under an obligation to withdraw that reservation. Draft guideline 2.5.X reproduced paragraph 10 of the Preliminary conclusions, with its statement that a State could (among other possible options) fulfil its legal obligations by totally or partially withdrawing a reservation. The Special Rapporteur also noted that the categorization, submitted by one member, of the various powers held by the monitoring bodies should appear in the commentary rather than in the draft guidelines themselves.

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[49] The Special Rapporteur did not wish to make a final decision on the terminological problem for the time being.

99. The Special Rapporteur concluded by saying that, although he was not convinced by the criticisms of the substance of the draft guidelines in question (2.5.4, 2.5.11 bis and 2.5.X), he would not, for the time being, request their referral to the Drafting Committee, for the question of withdrawal was, ultimately, of secondary importance.

100. The major elements in the draft guidelines were, on the one hand, the powers of treaty monitoring bodies and, on the other hand, the consequences of the inadmissibility of a reservation. That being so, he intended to submit some amended versions, either at future debates on the admissibility of reservations or during the review of the Preliminary conclusions. With regard to the other draft guidelines, including the draft model clauses, he believed the Commission had no objection to their being referred to the Drafting Committee.

101. At its 2739th meeting, on 31 July 2002, the Commission decided to refer to the Drafting Committee draft guidelines 2.5.1 (Withdrawal of reservations), 2.5.2 (Form of withdrawal), 2.5.3 (Periodic review of the usefulness of reservations), 2.5.5 (Competence to withdraw a reservation at the international level), 2.5.5 bis (Competence to withdraw a reservation at the internal level), 2.5.5 ter (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations), 2.5.6 (Communication of withdrawal of a reservation), 2.5.6 bis (Procedure for communication of withdrawal of reservations), 2.5.6 ter (Functions of depositaries), 2.5.7 (Effect of withdrawal of a reservation), 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization), 2.5.9 (Effective date of withdrawal of a reservation) (including the related model clauses), 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), 2.5.11 (Partial withdrawal of a reservation) and 2.5.12 (Effect of a partial withdrawal of a reservation).

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

102. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

Guide to Practice

1. Definitions

1.1 Definition of reservations[49]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4][50] Object of reservations[51]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated[52]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

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[49] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

[50] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

[51] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[52] For the commentary to this draft guideline see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203-206.

1.1.3 [1.1.8] Reservations having territorial scope[53]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[54]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[55]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means[56]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[57]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

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[53] For the commentary to this draft guideline, see ibid., pp. 206-209.

[54] For the commentary to this draft guideline, see ibid., pp. 209-210.

[55] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

[56] For the commentary to this draft guideline, see ibid., pp. 222-223.

[57] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

1.1.8 Reservations made under exclusionary clauses[58]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 Definition of interpretative declarations[59]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[60]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[61]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[62]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

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[58] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241.

[59] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[60] For the commentary to this draft guideline, see ibid., pp. 240-249.

[61] For the commentary to this draft guideline, see ibid., pp. 249-252.

[62] For the commentary to this draft guideline, see ibid., pp. 252-253.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[63]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] Phrasing and name[64]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[65]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[66]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

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[63] For the commentary to this draft guideline, see ibid., pp. 254-260.

[64] For the commentary to this draft guideline, see ibid., pp. 260-266.

[65] For the commentary to this draft guideline, see ibid., pp. 266-268.

[66] For the commentary to this draft guideline, see ibid., pp. 268-270.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[67]

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[68]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[69]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy[70]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[71]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

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[67] For the commentary to this draft guideline, see ibid., pp. 270-273.

[68] For the commentary to this draft guideline, see ibid., pp. 273-274.

[69] For the commentary to this draft guideline, see ibid., pp. 275-280.

[70] For the commentary to this draft guideline, see ibid., pp. 280-284.

[71] For the commentary to this draft guideline, see ibid., pp. 284-289.

1.4.6. [1.4.6, 1.4.7] Unilateral statements made under an optional clause[72]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[73]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties[74]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[75]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

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[72] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10*, pp. 241-247.

[73] For the commentary to this draft guideline, see ibid., pp. 247-252.

[74] For the commentary, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[75] For the commentary to this draft guideline, see ibid., pp. 290-302.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[76]

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party[77]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions[78]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations[79]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[80]

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

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[76] For the commentary to this draft guideline, see ibid., pp. 302-306.

[77] For the commentary to this draft guideline, see ibid., pp. 306-307.

[78] For the commentary to this draft guideline, see ibid., pp. 308-310.

[79] For the commentary see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10) pp. 252-253.

[80] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 253-269.

1.7.2 [1.7.5] Alternatives to interpretative declarations[81]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

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[81] For the commentary to this draft guideline, see ibid., pp. 270-272.

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 bis, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of depositaries

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 bis] Procedure in case of manifestly [impermissible] reservations

Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.2.1 Formal confirmation of reservations formulated when signing a treaty[82]

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[83]

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[84]

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

...[85]

2.3.1 Late formulation of a reservation[86]

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other contracting parties objects to the late formulation of the reservation.

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[82] For the commentary to this draft guideline, see ibid., *Fifty-sixth session, Supplement No. 10* (A/56/10), pp. 465-472.

[83] For the commentary to this draft guideline, see ibid., pp. 472-474.

[84] For the commentary to this draft guideline, see ibid., pp. 474-477.

[85] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

[86] For the commentary to this draft guideline, see ibid., pp. 477-489.

2.3.2 Acceptance of late formulation of a reservation[87]

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation[88]

If a contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations[89]

A contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

2.4.1 Formulation of interpretative declarations

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 bis] Formulation of an interpretative declaration at the internal level

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

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[87] For the commentary to this draft guideline, see ibid., pp. 490-493.

[88] For the commentary to this draft guideline, see ibid., pp. 493-495.

[89] For the commentary to this draft guideline, see ibid., pp. 495-499.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.3 Time at which an interpretative declaration may be formulated[90]

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7], and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[91]

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[92]

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] Late formulation of an interpretative declaration[93]

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other contracting parties objects to the late formulation of the interpretative declaration.

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[90] For the commentary to this draft guideline, see ibid., pp. 499-501.

[91] For the commentary to this draft guideline, see ibid., pp. 501-502.

[92] For the commentary to this draft guideline, see ibid., pp. 502-503.

[93] For the commentary to this draft guideline, see ibid., pp. 503-505.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations

A conditional interpretative declaration must be formulated in writing.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

2.4.8 Late formulation of a conditional interpretative declaration[94]

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other contracting parties objects to the late formulation of the conditional interpretative declaration.

2. Text of the draft guidelines with commentaries thereto provisionally adopted by the Commission at its fifty-fourth session

103. The text of the draft guidelines with commentaries thereto adopted by the Commission at the fifty-fourth session are reproduced below.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form

A reservation must be formulated in writing.

Commentary

(1) Under article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, a reservation "must be formulated in writing and communicated to the contracting States and contracting

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[94] For the commentary to this draft guideline, see ibid., pp. 505-506. This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

organizations and other States and international organizations entitled to become parties to the treaty". Draft guideline 2.1.1 covers the first of these requirements; the second is dealt with in draft guideline 2.1.5.

(2) Although it is not included in the actual definition of a reservation[95] and the word "statement", which is included, refers to both oral and written statements, the need for a reservation to be in writing was never called into question during the *travaux préparatoires* for the Vienna Conventions. The Commission's final commentary on what was then the first paragraph of draft article 18 and was to become, without any change in this regard, article 23, paragraph 1, of the 1969 Vienna Convention, presents it as self-evident that a reservation must be in writing.[96]

(3) That was the opinion expressed in 1950 by J.L. Brierly, who, in his first report, suggested the following wording for article 10, paragraph 2:

> "Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty."[97]

(4) This suggestion elicited no objections (except to the word "authenticated") during the discussions in 1950,[98] but the question of the form that reservations should take was not considered again until the first report by Fitzmaurice in 1956; under draft article 37, paragraph 2, which he proposed and which is the direct precursor of current article 23, paragraph 2,

> "Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference ...".[99]

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[95] Cf. draft guideline 1.1 of the Guide to Practice, which combines the definitions in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (j), of the 1978 Convention; see *Yearbook of the International Law Commission, 1998*, vol. II (Part Two), pp. 99-100.

[96] See *Yearbook ... 1966*, vol. II, p. 208.

[97] First report on the law of treaties, *Yearbook ... 1950*, vol. II, p. 239.

[98] *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, pp. 91-92.

[99] *Yearbook ... 1956*, vol. II, p. 115.

(5) In 1962, following the first report by Sir Humphrey Waldock,[100] the Commission elaborated on this theme:

> "Reservations, which must be in writing, may be formulated:
>
> (i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connection with the adoption of the treaty;
>
> (ii) Upon signing the treaty at a subsequent date; or
>
> (iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it."[101]

This provision was hardly discussed by the members of the Commission.[102]

(6) In conformity with the position of two Governments,[103] which had suggested "some simplification of the procedural provisions",[104] Sir Humphrey Waldock made a far more restrained drafting proposal on second reading, namely:

> "A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States."[105]

This draft is the direct source of article 23, paragraph 1, of the Vienna Conventions.

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[100] *Yearbook ... 1962*, vol. II, p. 60.

[101] Draft article 18, para. 2 (a), ibid., p. 176; for the commentary on this provision, see ibid., p. 180; see also the commentary to draft guideline 2.2.1, *Report of the International Law Commission*, fifty-third session, A/56/10, paras. (4) and (5), p. 466.

[102] See the summary records of the 651st to 656th meetings (25 May-4 June 1962), *Yearbook ... 1962*, vol. I, pp. 155-195. See the fifth report, ibid., para. 237; however, see paragraph (8) below.

[103] Denmark and Sweden (cf. the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, pp. 46 and 47).

[104] Ibid., p. 53, para. 13.

[105] Draft article 20, para. 1, ibid.; para. 13, p. 56.

(7) While the wording was changed, neither the Commission[106] nor the Vienna Conference of 1968-1969[107] ever called into question the need for reservations to be formulated in writing. And neither Paul Reuter, Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations, nor the participants in the Vienna Conference of 1986 added clarifications or suggested any changes in this regard. The *travaux préparatoires* thus show remarkable unanimity in this respect.

(8) This is easily explained. It has been written that: "Reservations are formal statements. Although their formulation in writing is not embraced by the term of the definition, it would according to article 23 (1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously, therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting parties. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depository, so that all interested States would become aware of them. A reservation not notified cannot be acted upon. Other States would not be able to expressly accept or object to such reservations."[108]

(9) Nonetheless, during the 1962 discussions, Sir Humphrey Waldock, replying to a question raised by Mr. Tabibi, did not totally exclude the idea of "oral reservations". He thought, however, that the question "belonged rather to the question of reservations at the time of the adoption of the treaty, which was dealt with in paragraph 2 (a) (i)", and that, in any case, the requirement of a formal confirmation "should go a long way towards disposing of the difficulty".[109]

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[106] See the final draft text in *Yearbook ... 1966*, vol. II, p. 208 (draft article 18, para. 1).

[107] See the report of the Committee of the Whole, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions*, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, A/CONF.39/14, pp. 138-139, paras. 190-196.

[108] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague, 1988, p. 44; see also Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin*, Martinus Nijhoff, 1994, p. 50.

[109] *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, para. 34, p. 223. See also a remark made by Brierly in 1950: "Mr. Brierly agreed that a reservation must be presented formally, but it might be announced informally during negotiations" (*Yearbook ... 1950*, vol. I, p. 91, para. 19).

(10) Ultimately, it hardly matters how reservations are formulated at the outset, if they must be formally confirmed at the moment of the definitive expression of consent to be bound. That is undoubtedly how article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions should be interpreted in the light of the *travaux préparatoires*: a reservation need be in writing only when formulated definitively, namely:

- When signing a treaty where the treaty makes express provision for this[110] or if signing is tantamount to definitive expression of consent to be bound (agreement in simplified form);[111] and
- In all other cases, where the State or international organization expresses its definitive consent to be bound.[112]

(11) The Commission is nevertheless of the opinion that the question whether a reservation may initially be formulated orally can be left open. As Sir Humphrey Waldock so rightly pointed out,[113] the answer has no practical impact: a contracting party can in any event formulate a reservation up to the date of its expression of consent to be bound; thus, even if its initial oral statement could not be regarded as a true reservation, the "confirmation" made in due course would serve as a formulation.

2.1.2 Form of formal confirmation

Formal confirmation of a reservation must be made in writing.

Commentary

(1) Article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions on "Procedure regarding reservations" does not expressly require reservations to be confirmed in writing. However, this provision, which is reproduced in draft guideline 2.2.1,[114] does require that a

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[110] See draft guideline 2.2.3, *Report of the International Law Commission*, fifty-third session, A/56/10, pp. 474-477.

[111] See draft guideline 2.2.2, ibid., pp. 472-474.

[112] See draft guideline 2.2.1, ibid., pp. 464-472.

[113] See paragraph (8) above.

[114] See the text of this guideline and the commentary thereto in the *Report of the International Law Commission*, fifty-third session, A/56/10, pp. 465-472.

reservation must be formally confirmed by the reserving State [or international organization] when expressing its consent to be bound by the treaty. The word "formally" must without any doubt be understood as meaning that this formality must be completed in writing.

(2) This interpretation is also in conformity with the *travaux préparatoires* for article 23: specifically because the confirmation must be made in writing, the Commission and its Special Rapporteurs on the law of treaties took the view that the question whether a reservation may initially be formulated orally could be left open.[115]

(3) The requirement of a written confirmation of a reservation is also a matter of common sense: a reservation could not be notified with any certainty to the other States and international organizations concerned, in accordance with the provisions of article 23, paragraph 1, if there were no formal text. This is, moreover, in keeping with a consistent practice to which there is, to the Commission's knowledge, no exception.

(4) It should, however, be pointed out that draft guideline 2.1.2 does not take a position on the question whether the formal confirmation of a reservation is always necessary. This is decided by draft guidelines 2.2.1 to 2.2.3, which show that there are cases that do not lend themselves to such a confirmation.[116]

2.1.3 Formulation of a reservation at the international level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(*a*) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

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[115] See the commentary to draft guideline 2.1.1, paras. (8) and (10).

[116] For the text of these draft guidelines and the commentaries thereto, see *Report of the International Law Commission*, fifty-third session, A/56/10, pp. 465-476.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

Commentary

(1) Draft guideline 2.1.3 defines the persons and organs which are authorized, by virtue of their functions, to formulate a reservation on behalf of a State or an international organization. Its text is based closely on that of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[117]

(2) The two Vienna Conventions of 1969 and 1986 contain no explanation in this regard. In his first report on the law of treaties in 1962, however, Sir Humphrey Waldock proposed a draft article which read:

> "Reservations shall be formulated in writing either:
>
> (i) On the face of the treaty itself and normally in the form of an adjunct to the signature of the representative of the reserving State;
>
> (ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;

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[117] Article 7 of the 1969 Vienna Convention on the Law of Treaties is drafted in much the same way, but, unlike the present Guide to Practice, it relates only to treaties between States.

(iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State".[118]

(3) As Sweden noted, with regard to the corresponding article adopted by the Commission on first reading,[119] such "procedural rules … would fit better into a code of recommended practices",[120] which is precisely the function of the Guide to Practice. The Commission has nevertheless concluded that it is not useful to include all of these clarifications in the Guide: the long list of instruments in which reservations may appear does not add much, particularly since the list is not restrictive, as is indicated by the reference in two places to an instrument other than those expressly mentioned.

(4) Clarification is needed only with regard to the author of the instrument in question. The 1962 text is nevertheless not entirely satisfactory in this regard. The reservation must probably be formulated by "a representative of the reserving State" or by "the competent authority of the reserving State".[121] The question is, however, whether there are rules of general international law to determine in a restrictive manner which authority or authorities are competent to formulate a reservation at the international level or whether this determination is left to the domestic law of each State.

(5) In the opinion of the Commission, the answer to this question may be deduced both from the general framework of the Vienna Conventions and from the practice of States and international organizations in this area.

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[118] Draft article 17, para. 3 (a), *Yearbook ... 1962,* vol. II, p. 60. In his commentary Waldock restricts himself to saying that this provision "does not appear to require comment" (ibid., p. 66).

[119] Draft article 18, para. 2 (a), ibid., p. 176.

[120] Fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, p. 47.

[121] See paragraph (2) above.

(6) By definition, a reservation has the purpose of modifying the legal effect of the provisions of a treaty in the relations between the parties; although it appears in an instrument other than the treaty, the reservation is therefore part of the corpus of the treaty and has a direct influence on the respective obligations of the parties. It leaves intact the *instrumentum* (or *instrumenta*) which constitute the treaty, but it directly affects the *negotium*. In this situation, it seems logical and inevitable that reservations should be formulated under the same conditions as the consent of the State or international organization to be bound. And this is not an area in which international law is based entirely on domestic laws.

(7) Article 7 of the 1969 and 1986 Vienna Conventions contains precise and detailed provisions on this point which undoubtedly reflect positive law on the subject. In the words of the 1986 Convention:

> "1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
>
> (*a*) That person produces appropriate full powers; or
>
> (*b*) It appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.
>
> "2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
>
> (*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty (...);
>
> (*b*) Representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty (...);
>
> (*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;
>
> (*d*) Heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.

> "3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty if:
>
> (*a*) That person produces appropriate full powers; or
>
> (*b*) It appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers."

(8) Mutatis mutandis, these rules, for the reasons indicated above, may certainly be transposed to the competence to formulate reservations, on the understanding, of course, that the formulation of reservations by a person who cannot "be considered (...) as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization".[122]

(9) Moreover, these restrictions on the competence to formulate reservations at the international level have been broadly confirmed in practice.

(10) In an aide-memoire of 1 July 1976, the United Nations Legal Counsel said:

> "A reservation must be formulated in writing (article 23, paragraph 1, of the [1969 Vienna] Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally."[123]

(11) Similarly, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the United Nations Office of Legal Affairs confines itself to noting that "the reservation must be included in the instrument or annexed to it and must emanate from one of the three qualified authorities" and to referring to general developments concerning the "deposit of binding instruments"[124] Likewise, according to

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[122] Cf. article 8 of the 1969 and 1986 Vienna Conventions.

[123] *United Nations Juridical Yearbook 1976*, p. 211, para. 7.

[124] ST/LEG/8, United Nations publication, Sales No. E.94.V.15, p. 49, para. 161; this passage refers to paras. 121 and 122, ibid., p. 36.

this document, "Reservations made at the time of signature must be authorized by the full powers granted to the signatory by one of the three qualified authorities or the signatory must be one of these authorities".[125]

(12) These rules seem to be strictly applied; all the instruments of ratification (or equivalents) of treaties containing reservations for which the Secretary-General is depositary are signed by one of the "three authorities" or, if they are signed by the permanent representative, the latter has attached full powers emanating from one of these authorities. Moreover, where this is not the case, the permanent representative is requested, informally but firmly, to make this correction.[126]

(13) The Commission nevertheless questioned whether this practice, which transposes to reservations the rules contained in article 7 of the Vienna Conventions, referred to above,[127] is not excessively rigid. It may be considered, for example, whether it would be legitimate to accept that the accredited representative of a State to an international organization which is the depositary of the treaty to which the State that he represents wishes to make a reservation should be authorized to make that reservation. The issue is particularly relevant because this practice is accepted in international organizations other than the United Nations.

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[125] Ibid., p. 62, para. 208; refers to chapter VI of the *Summary* ("Full powers and signatures").

[126] This is confirmed, by analogy, by the procedural incident between India and Pakistan that came before the International Court of Justice in the recent *Aerial Incident of 10 August 1999* case. Oral pleadings revealed that in an initial communication dated 3 October 1973, the Permanent Mission of Pakistan to the United Nations gave notification of that country's intent to succeed British India as a party to the General Act of Arbitration of 1928. In a note dated 31 January 1974, the Secretary-General requested that such notification should be made "in the form prescribed", in other words, that it should be transmitted by one of the three authorities mentioned above; this notification took the form of a new communication (formulated in different terms than that of the preceding year), dated 30 May 1974 and signed this time by the Pakistani Prime Minister (see the pleadings by Sir Elihu Lauterpacht on behalf of Pakistan, 5 April 2000, CR/2000/3, and by A. Pellet on behalf of India, 6 April 2000, CR/2000/4). While this episode concerned a notification of succession and not the formulation of reservations, it testifies to the great vigilance with which the Secretary-General applies the rules set forth above (para. (11)) with regard to the general expression by States of their consent to be bound by a treaty.

[127] Paragraph (7).

(14) Thus, it seems, for example, that the Secretary-General of the Organization of American States (OAS) and the Secretary-General of the Council of Europe accept reservations recorded in letters from permanent representatives.[128]

(15) We might also consider that the rules applying to States should be transposed more fully to international organizations than they are in article 7, paragraph 2, of the 1986 Vienna Convention and, in particular, that the head of the secretariat of an international organization or its accredited representatives to a State or another organization should be regarded as having competence ipso facto to bind the organization.

(16) It may legitimately be considered that the recognition of such limited extensions to competence for the purpose of formulating reservations would constitute a limited but welcome progressive development. The Commission, supported by a large majority of States, has nevertheless consistently been careful not to change the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[129] However, even if the provisions of article 7 of the 1969 and 1986 Conventions do not expressly deal with competence to formulate reservations, they are nonetheless rightfully[130] regarded as transposable to this case.

(17) By way of a compromise between these two requirements, the Commission adopted a sufficiently flexible draft guideline which, while referring to the rules in article 7, maintains the less rigid practice followed by international organizations other than the United Nations as depositaries.[131] The need for flexibility is reflected in the inclusion, at the beginning of draft guideline 2.1.3, of the expression "Subject to the customary practices in international organizations which are depositaries of treaties." This expression should, incidentally, be

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[128] Cf. the reply by OAS in "Depositary practice of States and international organizations in relation to reservations", report of the Secretary-General submitted pursuant to General Assembly resolution 1452 B (XIX), document A/5687, reproduced in *Yearbook ... 1965*, vol. II, p. 84. Cf. the *European Treaty Series*, No. 24.

[129] Cf. *Yearbook ... 1995*, vol. II (Part Two), para. 487.

[130] See paragraph (6) above.

[131] See paragraph (14) above. The International Telecommunication Union (ITU) is also a special case in this regard, but in a different sense and for different reasons, since reservations to texts equivalent to treaties adopted by that body "can be formulated only by delegations, namely, *during conferences*" (reply by ITU to the Commission's questionnaire on reservations - emphasis in text).

understood as applying both to the case where the international organization itself is the depositary and to the more usual case where this function is exercised by the organization's most senior official, the Secretary-General or the Director-General.

(18) It should also be noted that the expression "for the purposes of adopting or authenticating the text of the treaty", as contained in draft guideline 2.1.3, paragraph 1 (a), covers signature, since the two (alternative or joint) functions of signature are precisely the authentication of the text of the treaty (see art. 10 of the Vienna Conventions) and the expression of consent to be bound by the treaty (art. 12).

2.1.4 [2.1.3 bis, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

Commentary

(1) Draft guideline 2.1.3 relates to the formulation of reservations at the international level, while draft guideline 2.1.4 deals with their formulation in the internal legal system of States and international organizations.

(2) It is self-evident that the international phase of formulating reservations is only the tip of the iceberg; as is true of the entire procedure whereby a State or an international organization expresses its consent to be bound, it is the outcome of an internal process that may be quite complex. Like the ratification procedure (or the acceptance, approval or accession procedure), from which it is indissociable, the formulation of reservations is a kind of "internal parenthesis" within an overwhelmingly international process.[132]

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[132] Cf. Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)* Librairie générale de droit et de jurisprudence, Paris, 6th ed., 1999, p. 144.

(3) As Paul Reuter has noted, "national constitutional practices with regard to reservations and objections change from one country to the next".[133] It may be noted, for example, that, of the 23 States which replied to the Commission's questionnaire on reservations to treaties and whose answers to questions 1.7, 1.7.1, 1.7.2, 1.8, 1.8.1 and 1.8.2[134] are utilizable, competence to formulate a reservation belongs to: the executive branch alone in six cases;[135] the Parliament alone in five cases;[136] and it is shared between them in 12 cases.

(4) In this last hypothesis, there are various modalities for collaboration between the executive branch and the Parliament. In som- cases, the Parliament is merely kept informed of intended reservations[137] - although not always systematically.[138] In others, it must approve all

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[133] *Introduction au droit des traités*, third edition, revised and enlarged by Philippe Cahier, PUF, Paris, 1995, para. 133*, pp. 84-85.

[134] Question 1.7: "At the internal level, which authority or authorities decide(s) that the State will formulate a reservation: The Head of State? The Government or a government body? The Parliament?"; question 1.7.1: "If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this based?"; question 1.7.2: "If the decision is taken by the Executive, is the Parliament: Informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?"; question 1.8: "Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?"; question 1.8.1: "If so, which authority and how is it seized of the matter?"; question 1.8.2: "What reason(s) can it invoke in taking such a decision?".

[135] Bolivia (the Parliament can suggest reservations), Colombia (for certain treaties), Croatia (the Parliament can oppose a proposed reservation, which would imply that it is consulted), Denmark, the Holy See and Malaysia. See also the States mentioned in footnotes 137 to 140 below.

[136] Colombia (for certain treaties), Estonia, Slovenia, San Marino, Switzerland (but the proposal is generally made by the Federal Council), unless the Federal Council has its own competence.

[137] Kuwait since 1994 (consultation of an ad hoc commission); New Zealand "until recently" (system provisionally established).

[138] France (if the rapporteurs of the Parliamentary Assemblies so request and as a mere "courtesy"), Israel, Japan (if the treaty does not contain a reservation clause), Sweden (the "outlines" of reservations are transmitted to Parliament, never their exact text).

reservations before their formulation[139] or, where only certain treaties are submitted to the Parliament, only those which relate to those treaties.[140] Moreover, a judicial body may be called upon to intervene in the internal procedure for formulating reservations.[141]

(5) It is interesting to note that the procedure for formulating reservations does not necessarily follow the one generally required for the expression of the State's consent to be bound. Thus, in France, it is only recently that the custom was established of transmitting to the Parliament the text of reservations which the President of the Republic or the Government intends to attach to the ratification of treaties or the approval of agreements, even where such instruments must be submitted to the Parliament under article 53 of the 1958 Constitution.[142]

(6) The diversity which characterizes the competence to formulate reservations and the procedure to be followed for that purpose among States seems to be mirrored among international organizations. Only two of them[143] answered questions 3.7, 3.7.1 and 3.7.2 of the questionnaire on reservations:[144] the Food and Agriculture Organization of the United Nations (FAO) states that such competence belongs to the Conference, while the International Civil Aviation Organization (ICAO), while emphasizing the lack of real practice, believes that if a reservation were formulated on its behalf, it would be formulated by the Secretary-General as an administrative matter and, as the case may be, by the Assembly or the Council in their respective

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[139] Argentina and Mexico.

[140] Finland, Republic of Korea, Slovakia and Spain.

[141] Colombia, Finland and Malaysia.

[142] Cf. Alain Pellet, commentary on article 53, in François Luchaire and G. Conac, ed. dirs., *La Constitution de la République française*, Paris, Economica, 2nd ed., 1987, pp. 1047-1050.

[143] This is explained by the fact that international organizations are parties to treaties much more rarely than States and that, where they are parties, they generally do not formulate reservations. The sole exception concerns the European Community which, regrettably, have not replied to the questionnaire to date.

[144] Question 3.7: "At the internal level, which organ(s) decide(s) that the organization will formulate a reservation: The chief executive officer? The general assembly? Another organ?"; question 3.7.1: "If it is not always the same organ that has competence to decide that a reservation will be formulated, on what criteria is this competence based?"; question 3.7.2: "If the decision is taken by the chief executive officer, is the general assembly: Informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?".

areas of competence,[145] with the stipulation that it would be "appropriate" for the Assembly to be informed of the reservations formulated by the Council or by the Secretary-General.

(7) In the view of the Commission, the only conclusion that can be drawn from these observations is that international law does not impose any specific rule with regard to the internal procedure for formulating reservations. This, to be frank, seems so obvious that some members of the Commission questioned whether it was worthwhile to stipulate it expressly in a draft guideline. Accordingly to the viewpoint that prevailed, however, it should be expressly stated in the light of the pragmatic character of the Guide to Practice. This is the object of the first paragraph of draft guideline 2.1.4.

(8) However, the freedom of States and international organizations to determine the authority competent to decide that a reservation will be formulated and the procedure to be followed in formulating it raises problems similar to those arising from the same freedom the parties to a treaty have with respect to the internal procedure for ratification: what happens if the internal rules are not followed?

(9) In the 1986 Vienna Convention, article 46 on the "provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties" provides that:

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.
>
> 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith."

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[145] Cf. articles 49 and 50 of the Chicago Convention on International Civil Aviation of 1944, which established ICAO.

(10) In the absence of practice, it is difficult to take a categorical position on the transposition of these rules to the formulation of reservations. Some elements argue in its favour: as discussed above,[146] the formulation of reservations cannot be dissociated from the procedure for expressing definitive consent to be bound; it occurs or must be confirmed at the moment of expression of consent to be bound and, in almost all cases, emanates from the same authority. These arguments are, however, not decisive. Whereas the internal rules on competence to conclude treaties are laid down in the constitution, at least in broad outline, that is not the case for the formulation of reservations, which derives from practice, and practice not necessarily in line with that followed when expressing consent to be bound.

(11) It is therefore unlikely that a violation of internal provisions can be "manifest" in the sense of article 46 of the Vienna Conventions cited above and one must fall back on international rules such as those set forth in draft guideline 2.1.3. The conclusion to be drawn is that a State or an international organization should not be allowed to claim that a violation of the provisions of internal law or of the rules of the organization has invalidated a reservation that it has formulated, if such formulation was the act of an authority competent at the international level.

(12) Since this conclusion differs from the rules applicable to "defective ratification" as set forth in article 46, it seems essential to state it expressly in a draft guideline. This is the object of the second paragraph of draft guideline 2.1.4.

(13) Some members of the Commission pointed out that this provision is superfluous because the author of the reservation can always withdraw it "at any time".[147] However, since it is far from having been established that such withdrawal may have a retroactive effect, the question of the validity of a reservation formulated in violation of the relevant rules of internal law may arise in practice, thereby justifying the inclusion of the rule stated in the second paragraph of draft guideline 2.1.4.

2.1.5 Communication of reservations

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

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[146] Para. (2).

[147] Article 22, para. 1, of the 1969 and 1986 Vienna Conventions.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

Commentary

(1) Once it has been formulated, the reservation must be made known to the other States or international organizations concerned. Such publicity is essential for enabling them to react, either through an acceptance or through an objection. Article 23 of the Vienna Conventions of 1969 and 1986 specifies the recipients of reservations formulated by a State or an international organization, but is silent on the procedure to be followed in effecting such notification. The object of draft guidelines 2.1.5 to 2.1.8 is to fill that gap, with draft guideline 2.1.5 referring more specifically to its recipients.

(2) Under article 23, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, a reservation must be communicated "to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". In addition, article 20, paragraph 3, which stipulates that a reservation to a constituent instrument requires "the acceptance of the competent organ" of the organization in order to produce effects, implies that the reservation must be communicated to the organization in question, as is stated in the second paragraph of draft guideline 2.1.5.

(3) The first group of recipients (contracting States and contracting organizations) does not pose any particular problem. These terms are defined in article 2, paragraph 1 (f), of the 1986 Convention[148] as meaning, respectively:

> "(i) a State, or
>
> (ii) an international organization,
>
> which has consented to be bound by the treaty, whether or not the treaty has entered into force."

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[148] See also article 2, para. 1 (f), of the 1969 Convention and article 2, para. 1 (k), of the 1978 Vienna Convention on Succession of States in Respect of Treaties, which define the term "contracting State" in the same way.

(4) Much more problematic, in contrast, are the definition and, still more, the determination in each specific case of the "other States and international organizations entitled to become parties to the treaty". As has been noted, "[n]ot all treaties are wholly clear as to which other States may become parties".[149]

(5) In his 1951 report on reservations to multilateral treaties, Brierly suggested the following provision:

> "The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):
>
> "(*a*) States entitled to become parties to the convention,
>
> "(*b*) States having signed or ratified the convention,
>
> "(*c*) States having ratified or acceded to the convention."[150]

(6) In conformity with these recommendations, the Commission suggested that, "in the absence of contrary provisions in any multilateral convention (...) [t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".[151]

(7) More vaguely, Sir Hersch Lauterpacht, in his first report in 1953 proposed in three of the four alternative versions of draft article 9 on reservations a provision stating that "[t]he text of the reservations received shall be communicated by the depositary authority to all the interested

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[149] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, Ninth Edition*, vol. I, *Peace*, London, Longman, 1992, p. 1248, note 4.

[150] *Yearbook ... 1951*, vol. II, p. 16.

[151] Report of the International Law Commission on the work of its third session 16 May-27 July 1951, A/1858, p. 8, para. 34 (see *Yearbook ... 1951*, vol. II, p. 130). This point was not extensively discussed; see, however, the statements by Hudson and Spiropoulos, the latter of whom considered that communication to States not parties to the Treaty was not an obligation under positive law (105th meeting, 18 June 1951, *Yearbook ... 1951*, vol. I, p. 198).

States".[152] But he does not comment on this phrase,[153] which is reproduced in the first report by G.G. Fitzmaurice in 1956,[154] who clarifies it as follows in draft article 39: these are "all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it".[155]

(8) Conversely, in 1962, Sir Humphrey Waldock reverted to the 1951 formulation[156] and proposed that any reservation formulated "by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties ...".[157] This was also the formula adopted by the Commission after the Drafting Committee had considered it and made minor drafting changes.[158] While States had not expressed any objections in this regard in their comments on the draft articles adopted on first reading, Sir Humphrey Waldock, with no explanations, proposed in 1965 to revert to the phrase "other States concerned",[159] which the

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[152] *Yearbook ... 1953*, vol. II, p. 92, alternatives B, C and D; oddly enough; this requirement does not appear in alternative A (acceptance of reservations by a two thirds majority, ibid., p. 91).

[153] Ibid., p. 136.

[154] Draft article 37, *Yearbook ... 1956*, vol. II, p. 115: they "must be brought to the knowledge of the other interested States ...".

[155] Ibid.

[156] See paragraphs (5) and (6) above.

[157] First report on the law of treaties, *Yearbook ... 1962*, vol. II, p. 60. Not without reason, Waldock believed that it was unnecessary to notify the other States which took part in the negotiations of a reservation formulated "when signing a treaty at a meeting or conference of the negotiating States" if it appeared at the end of the treaty itself or in the final act of the conference (ibid.).

[158] Draft article 18, para. 3; see ibid., p. 176. In its commentary, the Commission considered that this phrase was equivalent to "other interested States" (ibid., p. 180).

[159] Fourth report, *Yearbook ... 1965*, vol. II, p. 56.

Commission replaced by "contracting States"[160] on the ground that the notion of "States concerned"[161] was "very vague", finally adopting, in 1966, the requirement of communication "to the other States entitled to become parties to the treaty",[162] a phrase which was "regarded as more appropriate to describe the recipients of the type of communications in question".[163]

(9) At the Vienna Conference, Mr. McKinnon pointed out, on behalf of the delegation of Canada, that that wording "might create difficulties for a depositary, as there was no criterion for deciding which were those States. It would therefore be preferable to substitute the phrase 'negotiating States and contracting States' as proposed in his delegation's amendment (A/CONF.39/C.1/L.158)".[164] Although this common-sense proposal was submitted to the Drafting Committee,[165] the latter preferred an amendment submitted by Spain,[166] which

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[160] Ibid., p. 162.

[161] Explanation given by Sir Humphrey Waldock at the 813th meeting, 29 June 1965, *Yearbook ... 1965*, vol. I, p. 267.

[162] Draft article 18, para. 1 (*Yearbook ... 1966*, vol. II, p. 208).

[163] Explanation given by Briggs, Chairman of the Drafting Committee, *Yearbook ... 1966*, vol. I, Part II, p. 293.

[164] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations, New York, 1969), *23rd meeting of the Committee of the Whole, 11 April 1968*, p. 124, Jochen A. Frowein points out that the United States of America had expressed the same concern in 1966 in the General Assembly's discussion of the International Law Commission's draft articles relating to depositaries (A/6309/Rev.1, p. 176) ("Some considerations regarding the function of the depositary - comments on art. 72, para. 1 (d), of the ILC's draft articles on the law of treaties", *ZaöRV* 1967, p. 533); see also Shabtai Rosenne, "More on the Depositary of International Treaties", *American Journal of International Law*, 1970, pp. 847-848.

[165] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference* (United Nations publication), report of the Committee of the Whole, p. 139, para. 194.

[166] Ibid., document A/CONF.39/C.1/L.149, para. 192 (i); for the text adopted, see ibid., para. 196.

appears in the final text of article 23, paragraph 1, of the 1969 Convention and which was reproduced in the 1986 text unchanged except for the addition of international organizations.[167]

(10) Not only is the phrase adopted obscure, but the *travaux préparatoires* for the 1969 Convention do little to clarify it. The same is true of subparagraphs (b) and (e) of article 77, paragraph 1, which, while not referring expressly to reservations, provide that the depositary is responsible for transmitting "to the parties and to the States entitled to become parties to the treaty" copies of the texts of the treaty and informing them of "notifications and communications relating to the treaty";[168] however, the *travaux préparatoires* for these provisions shed no light on this phrase,[169] on which the Commission's members have never focused their attention.

(11) This was not the case during the preparation of the 1986 Convention. Whereas the Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations had, in his fourth and fifth reports,[170] merely adapted without comment the text of article 23, paragraph 1, of the 1969 Convention, several members of the Commission expressed particular concern during the discussion of the draft

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[167] See paragraph (2) above.

[168] Under article 77, para. 1 (f), the depositary is also responsible for "informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited".

[169] On the origin of these provisions, see, in particular, the 1951 report by J.L. Brierly, *Yearbook ... 1951*, vol. II, p. 27, and the conclusions of the Commission, ibid., p. 130, para. 34 (l); article 17, para. 4 (c), and article 27, para. 6 (c), of the draft proposed by Waldock in 1962, *Yearbook ... 1962*, vol. II, pp. 66 and 82-83, and article 29, para. 5, of the draft adopted by the Commission on first reading, ibid., p. 185; and draft article 72 adopted definitively by the Commission in 1966, *Yearbook ... 1966*, vol. II, p. 269.

[170] *Yearbook ... 1975*, vol. II, p. 38, and *Yearbook ... 1976*, vol. II (Part One), p. 146.

in 1977 regarding the problems posed by the determination of "international organizations entitled to become parties to the treaty".[171] However, following a contentious debate, it was decided merely to transpose the 1969 formulation.[172]

(12) It is certainly regrettable that the limitations proposed by Canada in 1968 and by Ushakov in 1977 regarding the recipients of communications relating to reservations were not adopted (in the second case, probably out of a debatable concern with not deviating from the 1969 wording and not making any distinction between the rights of States and those of international organizations); such limitations would have obviated practical difficulties for depositaries without significantly calling into question the "useful" publicity of reservations among truly interested States and international organizations.[173]

(13) There is obviously no problem when the treaty itself determines clearly which States or international organizations are entitled to become parties, at least in the case of "closed" treaties; treaties concluded under the auspices of a regional international organization such as the Council

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[171] For example, Ushakov observed that: "In the case of treaties of a universal character concluded between States and international organizations, such communications would thus have to be made to all existing States. For the same category of treaties and also treaties concluded between international organizations only, it would, however, be more difficult to determine what international organizations were 'entitled to become parties'. If 10 international organizations were parties to a treaty, to what other international organizations would the communications have to be sent?" (*Yearbook ... 1977*, vol. 1, 1434th meeting, 6 June 1977, p. 101, para. 42).

[172] See in particular the statements by S. Verosta, J.J. Calle y Calle, S. Schwebel and P. Reuter, ibid., p. 102, paras. 45, 46, 48 and 51, and the conclusion of the debates, ibid., 1451st meeting, 1 July 1977, p. 196 and *Yearbook ... 1977*, vol. II, p. 116.

[173] It is interesting to note that, while the specialized agencies of the United Nations are not, and are not entitled to become, "parties" to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, they do receive communications relating to the reservations formulated by some States with regard to its provisions. See, in particular, the *Summary of the practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/8, New York, 1997) Sales No. F.94.V.15, pp. 60-61, paras. 199-203.

of Europe,[174] OAS[175] or OAU[176] often fall into this category. Things are much more complicated when it comes to treaties that do not indicate clearly which States are entitled to become parties to them or "open" treaties containing the words "any State",[177] or when it is established that participants in the negotiations were agreed that later accessions would be possible.[178] This is obviously the case most particularly when depositary functions are assumed by a State which not only has no diplomatic relations with some States,[179] but also does not recognize as States certain entities which proclaim themselves to be States.

(14) The 1997 *Summary of the practice of the Secretary-General as depositary of multilateral treaties* devotes an entire chapter to describing the difficulties encountered by the Secretary-General in determining the "States and international organizations which may become

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[174] See, for instance, article K, para. 1, of the 3 May 1996 version of the European Social Charter: "This Charter shall be open for signature by the members of the Council of Europe"; or article 32, para. 1, of the Council of Europe Criminal Law Convention on Corruption of 27 January 1999.

[175] See, for example, article XXI of the Inter-American Convention against Corruption also of 29 March 1996.

[176] See also, for instance, article 12, para. 1, of the Lusaka Agreement of 8 September 1994 on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora.

[177] See, for instance, article XIII of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "The present Convention is open for signature by all States ..."; or article 84, para. 1, of the Vienna Convention of 1986: "The present Convention shall remain open for accession by any State, by Namibia (...) and by any international organization which has the capacity to conclude treaties." See also article 305 of the 1982 United Nations Convention on the Law of the Sea, which opens the Convention for signature by not only "all States", but also Namibia (before its independence) and self-governing States and territories.

[178] Cf. article 15 of the Vienna Conventions of 1969 and 1986.

[179] Cf. article 74 of the Vienna Conventions.

parties",[180] difficulties which legal theorists have largely underscored.[181] However, States which replied on this point to the Commission's questionnaire on reservations to treaties do not mention any particular difficulties in this area, but this can probably be explained by the fact that the problem is not specific to reservations and more generally concerns depositary functions. That is also why the Commission saw no merit in proposing the adoption of one or more draft guidelines on this point.

(15) By contrast, it is certainly necessary to reproduce in the Guide to Practice the rule set forth in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions (taking the latter in its broadest formulation), no matter how problematic and arguable the provision may be.

(16) The Commission also wished to specify that, just as reservations must be formulated and confirmed in writing,[182] so too must they be communicated in writing to the other States or international organizations concerned, as the only means of enabling the recipients to react to them in full knowledge of the facts. This latter requirement is only implicit in the Vienna Convention, but it is clear from the context, since article 23, paragraph 1, is the provision which requires that reservations be formulated in writing and which uses a very concise formula to link that condition to the requirement that reservations be communicated. Besides, when there is no depositary, the formulation and communication of reservations necessarily go hand in hand.[183] Moreover, practice confines itself to communications in written form.[184]

(17) The second paragraph of draft guideline 2.1.5 concerns the particular case of reservations to constituent instruments of international organizations.

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[180] Op. cit. (footnote 173 above), chap. V, pp. 21-30, paras. 73-100.

[181] See, inter alia, Jochen A. Frowein, "Some considerations regarding the function of the depositary - comments on art. 72, para. 1 (d), of the ILC's draft articles on the law of treaties", *ZaöRV* 1967, pp. 533-539, and Shabtai Rosenne, "More on the depositary of international treaties", *American Journal of International Law*, 1970, pp. 847-848.

[182] See draft guidelines 2.1.1. and 2.1.2.

[183] See draft guideline 2.1.6 (i).

[184] Cf. the "depositary notifications" of the Secretary-General of the United Nations.

(18) Article 23 of the 1969 and 1986 Vienna Conventions concerning the "Procedure regarding reservations" does not deal with this particular case. The general rule set forth in paragraph 1 of the article must, however, be clarified and expanded in this respect.

(19) According to article 20, paragraph 3, of the Vienna Conventions:

> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

Now, that organ can take a decision only if the organization is aware of the reservation, which must therefore be communicated to it.

(20) This problem was overlooked by the first three Special Rapporteurs on the law of treaties and taken up only by Sir Humphrey Waldock in his first report in 1962. He proposed a long draft article 17 on the "Power to formulate and withdraw reservations", paragraph 5 of which provided that:

> "However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization."[185]

(21) Waldock indicated that this clarification was motivated by

> "a point to which attention is drawn in paragraph 81 of the *Summary of the Practice of the Secretary-General* (ST/LEG/7), where it is stated:
>
> > 'If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions.'"[186]

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[185] *Yearbook ... 1962*, vol. II, p. 61.

[186] See ibid., para. (12), p. 66.

(22) This provision disappeared from the draft after its consideration by the Drafting Committee,[187] probably because the latter's members felt that the adoption of an express stipulation that the decision on the effect of a reservation to a constituent instrument must be taken by "the competent organ of the organization in question"[188] made that clarification superfluous. The question does not appear to have been raised again subsequently.

(23) It is not surprising that Sir Humphrey Waldock asked the question in 1962: three years earlier, the problem had arisen critically in connection with a reservation by India to the Convention on the Intergovernmental Maritime Consultative Organization (IMCO). The Secretary-General of the United Nations, as depositary of the Convention, transmitted to IMCO the text of the Indian reservation, which had been made that same day on the opening of the first session of the IMCO Assembly. He suggested that the IMCO secretariat should refer the question to the IMCO Assembly for a decision. When this referral was contested, the Secretary-General, in a well-argued report, maintained that "this procedure conformed (1) to the terms of the IMCO Convention; (2) to the precedents in depositary practice where an organ or body was in a position to pass upon a reservation; and (3) to the views on this specific situation expressed by the General Assembly during its previous debates on reservations to multilateral conventions".[189]

(24) The Secretary-General stated, inter alia, that, "in previous cases where reservations had been made to multilateral conventions which were in force and which either were constitutions of organizations or which otherwise created deliberative organs, the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question".[190] He cited as examples the communication to the World Health Assembly of the reservation formulated in 1948 by the United States of America to the

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[187] See the *Report of the International Law Commission to the General Assembly*, draft article 18, ibid., pp. 175-176.

[188] Draft article 20, para. 4, ibid.

[189] *Reservations to multilateral conventions: the Convention on the Intergovernmental Maritime Consultative Organization*, document A/4235, para. 18. See also on this incident Oscar Schachter, "The question of treaty reservations at the 1959 General Assembly", *American Journal of International Law*, 1960, pp. 372-379.

[190] Ibid., para. 21.

Constitution of the World Health Organization[191] and the communication the following year of reservations made by the Union of South Africa and by Southern Rhodesia to the General Agreement on Tariffs and Trade (GATT) to the GATT Contracting Parties.[192] In the 1997 *Summary of practice*, the Secretary-General gives another example of his consistent practice in this regard: "when Germany and the United Kingdom accepted the Agreement establishing the African Development Bank of 17 May 1979, as amended, they made reservations which had not been contemplated in the Agreement. The Secretary-General, as depositary, duly communicated the reservations to the Bank and accepted the deposit of the instruments only after the Bank had informed him that it had accepted the reservations".[193]

(25) In view of the principle set forth in article 20, paragraph 3, of the Vienna Conventions and of the practice normally followed by the Secretary-General of the United Nations, the Commission considered it useful to set forth in a draft guideline the obligation to communicate reservations to the constituent instrument of an international organization to the organization in question.

(26) It nevertheless asked three questions in relation to the precise scope of this rule, the principle of which does not appear to be in doubt:

> (1) Should the draft guideline include the clarification (which was included in the 1962 Waldock draft[194]) that the reservation must be communicated to the head of the secretariat of the organization concerned?
>
> (2) Should it state that the same rule applies when the treaty is not, strictly speaking, the constituent instrument of an international organization, but creates a "deliberative organ" that may take a position on whether or not the reservation is valid, as the Secretary-General had done in his 1959 *Summary of practice*?[195] and

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[191] See also Oscar Schachter, "Development of international law through the legal opinions of the United Nations Secretariat", *British Yearbook of International Law*, 1959, pp. 124-126.

[192] A/4235, para. 22.

[193] ST/LEG/8, New York, 1997, Sales No. E.94.V.15, p. 59, para. 198 - footnotes omitted. See also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague, 1988, pp. 346-347.

[194] See paragraph (20) above.

[195] See paragraph (24) above.

(3) Does the communication of a reservation to the constituent instrument of an international organization to the latter organization remove the obligation also to communicate the text of the reservation to interested States and international organizations?

(27) On the first question, the Commission considered that such a clarification is not necessary: even if, generally speaking, the communication will be addressed to the head of the secretariat, this may not always be the case because of the particular structure of a given organization. In the case of the European Community, for example, the collegial nature of the Commission might raise some problems. Moreover, such a clarification has hardly any concrete value: what matters is that the organization in question should be duly alerted to the problem.

(28) On the question whether the same rule should apply to "deliberative organs" created by a treaty which nonetheless are not international organizations in the strict sense of the term, it is very likely that, in 1959, the drafters of the report of the Secretary-General of the United Nations had GATT in mind - especially since one of the examples cited related to that organization.[196] The problem no longer arises in that connection, since GATT has been replaced by the World Trade Organization (WTO). The fact remains, however, that certain treaties, especially in the field of disarmament or environmental protection, create deliberative bodies having a secretariat which have sometimes been denied the status of an international organization.[197] The Commission does not intend to take a position on the matter; it considers, however, that it would be useful to allude to this hypothesis in the Guide to Practice. It would seem justifiable to apply this same rule to reservations to constituent instruments *stricto sensu* and to reservations to treaties creating oversight bodies that assist in the application of the treaty whose status as international organizations might be subject to challenge.

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[196] See ibid.

[197] See, for example, Robin R. Churchill and Geir Ulfstein, "Autonomous institutional arrangements in multilateral agreements: a little-noticed phenomenon in international law", American Journal of International Law, 2000, No. 4, pp. 623-659; some authors also argue that the International Criminal Court is not, strictly speaking, an international organization.

(29) Nevertheless, most members of the Commission considered that, in order to classify this type of body, the expression "deliberative organs", which had its supporters, was not the most appropriate and that, in order to avoid any type of confusion, it was preferable to refer to "organs that have the capacity to accept a reservation".

(30) The reply to the last question mentioned above[198] is the trickiest. It is also the one that has the greatest practical significance, for a reply in the affirmative would impose a heavier burden on the depositary than a negative one. Moreover, the practice of the Secretary-General - which does not appear to be wholly consistent[199] - seems to tend rather in the opposite direction.[200] The Commission nevertheless believes that a reservation to a constituent instrument should be communicated not only to the organization concerned, but also to all other contracting States and organizations and to those entitled to become members thereof.

(31) Two arguments are advanced in support of this position. The first is that it is by no means evident that an organization's acceptance of the reservation precludes member States (and international organizations) from objecting to it; the Commission proposes to decide on the matter after it undertakes an in-depth study of whether or not it is possible to object to a reservation that is expressly provided for in a treaty. Secondly, there is a good practical

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[198] Para. (26).

[199] For an earlier example in which it appears that the Secretary-General communicated the reservation of the United States of America to the Constitution of the World Health Organization both to interested States and to the organization concerned, see Oscar Schachter, "Development of international law through the legal opinions of the United Nations Secretariat", *British Yearbook of International Law*, 1948, p. 125. See also the *Summary of the practice of the Secretary-General as depositary of multilateral treaties*, ST/LEG/8, New York, 1997, Sales No. E.94.V.15, p. 51, para. 170.

[200] In at least one case, however, the State author of a unilateral declaration (which was tantamount to a reservation) - in this case, the United Kingdom - directly consulted the signatories to an agreement establishing an international organization, the Kingston Agreement of 18 October 1969 establishing the Caribbean Development Bank, about the declaration (cf. *Multilateral Treaties Deposited with the Secretary-General, status as at 31 December 2000*, vol. I, p. 482, note 8). The author of the reservation may also take the initiative to consult the international organization concerned (cf. the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcast Development, Kuala Lumpur, 12 August 1977 - ibid., vol. II, p. 298, note 3).

argument to support this affirmative reply: even if the reservation is communicated to the organization itself, it is in fact its own member States (or international organizations) that will decide. It is therefore important for them to be aware of the reservation. A two-step procedure is a waste of time.

(32) It goes without saying that the obligation to communicate the text of reservations to a constituent instrument to the international organization concerned arises only if the organization exists, in other words, if the treaty is in force.[201] This appears so evident that some members of the Commission questioned whether it was necessary to clarify it in the draft directive. However, it appeared that this clarification was necessary, since, without it, it would be difficult to understand the end of the second paragraph of draft guideline 2.1.5 (it is impossible to communicate a reservation to an international organization or to an organ that does not yet exist).

(33) The question may nevertheless arise as to whether such reservations should not also be communicated before the effective creation of the organization to the "preparatory committees" (or whatever name they may be given) that are often established to prepare for the prompt and effective entry into force of the constituent instrument. Even if, in many cases, an affirmative reply again appears necessary, it would be difficult to generalize, since everything depends on the exact mandate that the conference that adopted the treaty gives to the preparatory committee. Moreover, the reference to "organs that have the capacity to accept a reservation" seems to cover this possibility.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

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[201] In practice, when the constituent instrument is not in force, the Secretary-General of the United Nations proceeds as he would in respect of any other treaty.

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In this case, the communication is considered as having been made on the date of the electronic mail or facsimile.

Commentary

(1) As in the two that follow, draft guideline 2.1.6 seeks to clarify aspects of the procedure to be followed in communicating the text of a treaty reservation to the addressees of the communication that are specified in draft guideline 2.1.5. It covers three different but closely linked aspects:

The author of the communication;

The practical modalities of the communication;

The effects.

(2) Article 23 of the 1969 and 1986 Vienna Conventions is silent as to the person responsible for such communication. In most cases, this will be the depositary, as shown by the provisions of article 79 of the 1986 Convention,[202] which generally apply to all notifications and communications concerning treaties. The provisions of that article also give some information on the modalities for the communication and its effects.

(3) On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty of the depositary to communicate the text of formulated reservations to interested States. Thus, in 1951, for example, the Commission believed that "the depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are

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[202] Article 78 of the 1969 Convention.

entitled to become parties to the convention".[203] Likewise, in his fourth report in 1965, Waldock proposed that a reservation "shall be notified to the depositary or, where there is no depositary, to the other interested States".[204]

(4) In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted "contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter", came to the conclusion that "it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications".[205]

(5) That is the object of draft article 73 of 1966, now article 78 of the 1969 Vienna Convention, which was reproduced, without change except for the addition of international organizations, in article 79 of the 1986 Convention:

> "Notifications and communications
>
> Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:
>
> (*a*) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;
>
> (*b*) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;
>
> (*c*) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (e)."

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[203] Report of the International Law Commission covering the work of its third session, 16 May-27 July 1951, *Yearbook ... 1951*, vol. II, document A/1858, para. 34, p. 130.

[204] *Yearbook ... 1965*, vol. II, p. 53.

[205] *Yearbook ... 1966*, vol. II, commentary to draft article 73, para. 1, p. 294.

(6) Article 79 is indissociable from this latter provision, under which:

> "1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:
>
> [...]
>
> (*e*) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty."

(7) It may be noted in passing that the expression "the parties and the States and international organizations entitled to become parties to the treaty", which is used in this paragraph, is not the exact equivalent of the formula used in article 23, paragraph 1, which refers to "contracting States and contracting organizations". The difference has no practical consequences, since the contracting States and contracting international organizations are entitled to become parties in accordance with the definition of that term given in article 2, paragraph 1 (f), of the 1986 Vienna Convention; it poses a problem, however, with regard to the wording of the draft guideline to be included in the Guide to Practice.

(8) Without doubt, the provisions of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention should be reproduced in the Guide to Practice and adapted to the special case of reservations; otherwise, the Guide would not fulfil its pragmatic purpose of making available to users a full set of guidelines enabling them to determine what conduct to adopt whenever they are faced with a question relating to reservations. But the Commission wondered whether, in preparing this draft, the wording of these two provisions should be reproduced, or that of article 23, paragraph 1. It seemed logical to adopt the terminology used in the latter so as to avoid any ambiguity and conflict - even purely superficial - between the various guidelines of the Guide to Practice.

(9) Moreover, there can be no doubt that communications relating to reservations - especially those concerning the actual text of reservations formulated by a State or an international organization - are communications "relating to the treaty" within the meaning of article 78, paragraph 1 (e), referred to above.[206] Furthermore, in its 1966 draft, the Commission expressly

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[206] See paragraph (6) above.

entrusted the depositary with the task of "examining whether a signature, an instrument *or a reservation* is in conformity with the provisions of the treaty and of the present articles"[207] (italics added). This expression was replaced in Vienna with a broader one - "the signature or any instrument, notification or communication relating to the treaty"[208] - which cannot, however, be construed as excluding reservations from the scope of the provision.

(10) In addition, as indicated in the Commission's commentary to draft article 73 (now article 79 of the 1986 Convention), the rule laid down in subparagraph (a) of this provision "relates essentially to notifications and communications relating to the 'life' of the treaty - acts establishing consent, *reservations*, objections, notices regarding invalidity, termination, etc." (italics added).[209]

(11) In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) reflect current practice.[210] They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State which is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement of 18 October 1969 establishing the Caribbean Development Bank, that it had consulted all the signatories to that agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and

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[207] *Yearbook ... 1966*, vol. II, p. 269, para. 1 (d) (italics added). On the substance of this provision, see the commentary to draft guideline 2.1.7.

[208] Article 77, para. 1 (d). The new formula is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference, First and Second Sessions*, A/CONF.39/11/Add.2) (United Nations publication, Sales No.: E.70.V.5), para. 654 (iv) (4), p. 202, and para. 660 (i), p. 203; see also para. 164, third bullet, below.

[209] *Yearbook ... 1966*, vol. II, p. 270, para. (2) of the commentary.

[210] See ibid. with regard to draft article 73 (a) (which became article 78 of the 1969 Convention and article 79 of the 1986 Convention).

which was subsequently accepted by the Board of Governors of the Bank and then withdrawn by the United Kingdom).[211] Likewise, France itself submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a reservation which it had formulated to the agreement establishing that organization, for which the Secretary-General is also depositary.[212]

(12) There seem to be no objections to this practice, provided that the depositary is not thereby released from his own obligations.[213] It is, however, a source of confusion and uncertainty in the sense that the depositary could rely on States formulating reservations to perform the function expressly conferred on him by article 78, paragraph 1 (e), and the final phrase of article 79 (a) of the 1986 Vienna Convention.[214] For this reason, the Commission considered that such a practice should not be encouraged and refrained from proposing a draft guideline enshrining it.

(13) In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 73, paragraph 1 (e) (now article 77, paragraph 1 (e), of the 1969 Vienna Convention),[215] and stressed "the obvious desirability of the prompt performance of this function by a depositary".[216] This is an important issue, which is linked to subparagraphs (b) and (c) of article 78:[217] the reservation produces effects only as from the date

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[211] *Treaties Deposited with the Secretary-General*, Status as at 31 December 2000, vol. I, p. 482, note 8.

[212] See ibid., vol. II, p. 298, note 3.

[213] See draft guideline 2.1.7.

[214] Article 77, paragraph 1 (e), and article 78 (a), respectively, of the 1969 Convention. In the aforesaid case of the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization's Governing Council (cf. *Multilateral Treaties Deposited with the Secretary-General*, status as at 31 December 2000, ST/LEG/SER.E/19 (United Nations publication, Sales No.: E.01.V.5), vol. II, p. 291, note 2). The Secretary-General's passivity in this instance is subject to criticism.

[215] Article 78, para. 1 (e), of the 1986 Convention.

[216] *Yearbook ... 1966*, vol. II, para. (5) of the commentary, p. 270.

[217] Article 79 (a) and (b) of the 1986 Convention. See the text of these provisions in paragraphs (5) and (6) above.

on which the communication relating thereto is received by the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation; he will have no one but himself to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise, the depositary could stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.[218]

(14) In practice, at the current stage of modern means of communication, depositaries, at any event in the case of international organizations, perform their tasks with great speed. Whereas in the 1980s the period between the receipt of reservations and communicating them varied from one to two and even three months, it is apparent from the information supplied to the Commission by the Treaty Section of the United Nations Office of Legal Affairs that:

> "1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.
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> "2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA 41 TR/221). Additionally, effective January 2001, depositary notifications can be viewed on the United Nations Treaty Collection on the Internet at: http://untreaty.un.org (depositary notifications on the Internet are for information

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[218] See the commentary to draft article 73 in the 1966 report of the Commission, *Yearbook ... 1966*, vol. II, pp. 270-271, paras. (3) to (6) of the commentary; see also T.O. Elias, *The Modern Law of Treaties*, Oceana Publications/Sijthoff, Dobbs Ferry/Leiden, 1974, pp. 216-217.

> purposes only and are not considered to be formal notifications by the depositary). Depositary notifications with bulky attachments, for example those relating to chapter 11 (b) 16,[219] are sent by facsimile."[220]

(15) For its part, the International Maritime Organization (IMO) has indicated that the time period between the communication of a reservation to a treaty for which the organization is depositary and its transmittal to the States concerned is generally from one to two weeks. Communications, which are translated into the three official languages of the organization (English, Spanish and French), are always transmitted by regular mail.

(16) The practice of the Council of Europe has been described to the Commission by the Secretariat of the Council as follows:

> "The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council of Europe requires that all notifications be made in one of the official languages or be at least accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office.). Urgent notifications that have immediate effect (e.g., derogations under article 15 of the European Convention on Human Rights) are carried out within a couple of days.

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[219] These are communications relating to the Agreement of 20 March 1958 concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (see *Multilateral Teaties Deposited with the Secretary-General*, status as at 31 December 2000, vol. 1, p. 593).

[220] The Treaty Section has also advised: "3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification (see LA 41 TR/221 (23-1))."

"Unless they prefer notifications to be sent directly to the Ministry of Foreign Affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.

"Since our new web site (http://conventions.coe.int) became operational in January 2000, all information relating to formalities is immediately made available on the web site. The texts of reservations or declarations are put on the web site the day they are officially notified. Publication on the web site is, however, not considered to constitute an official notification."

(17) Lastly, it is apparent from information from the Organization of American States (OAS) that:

"Member States are notified of any new signatures and ratifications to inter-American treaties through the OAS Newspaper, which circulates every day. In a more formal way, we notify every three months through a procès-verbal sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.

"The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English."

(18) It did not seem necessary to the Commission for these very helpful clarifications to be reproduced in full in the Guide to Practice. It nonetheless seemed useful to give in draft guideline 2.1.6 some information in the form of general recommendations intended both for the depositary (where there is one) and for the authors of reservations (where there is no

depositary). This combines the text of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention[221] and adapts it to the special problems posed by the communication of reservations.

(19) The chapeau of the draft guideline reproduces the relevant parts that are common to the chapeaux of articles 78 and 79 of the 1969 and 1986 Vienna Conventions, with some simplification: the wording decided upon at Vienna to introduce article 78 ("the contracting States and contracting organizations or, as the case may be, by the contracting organizations ...") appears to be unnecessarily cumbersome and contains little additional information. Moreover, as was mentioned above,[222] the text of draft guideline 2.1.6 reproduces the formulation used in article 23, paragraph 1, of the 1986 Convention ("to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty"), in preference to that used in article 78, paragraph 1 (e), ("the parties and the States and international organizations entitled to become parties to the treaty"). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Vienna Conventions relating to reservations. Nevertheless, it did not seem useful to burden the text by using the article 23 expression twice in subparagraphs (i) and (ii). Incidentally, this purely drafting improvement involves no change in the Vienna text: the expression "the States and organizations for which it is intended" (ii) refers to the "contracting States and contracting organizations and other States and international organizations entitled to become parties" (i). Similarly, the subdivision of the draft's first paragraph into two separate subparagraphs probably makes it more readily understandable, without changing the meaning.

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[221] Articles 77, para. 1 (e), and 79 of the 1969 Convention.

[222] Paragraphs (7) and (8).

(20) As to the time periods for the transmittal of the reservation to the States or international organizations for which it is intended, the Commission did not think it possible to establish a rigid period of time. The expression "as soon as possible", in subparagraph (ii), seems enough to draw the attention of the addressees to the need to proceed rapidly. On the other hand, such an indication is not required in subparagraph (i): it is for the author of the reservation to assume his responsibilities in this regard.[223]

(21) In keeping with draft guidelines 2.1.1 and 2.1.2, which point out that the formulation and confirmation of reservations must be done in writing, the last paragraph of draft guideline 2.1.6 specifies that communication to the States and international organizations for which they are intended must be formal. While some members of the Commission may have expressed doubts about the need for this stipulation, it seemed useful in view of the frequent practice among depositaries of using modern means of communication - electronic mail or fax - which are less reliable than traditional methods. For this reason, a majority of the members of the Commission considered that any communication concerning reservations should be confirmed in a diplomatic note (in cases where the author is a State) or in a depositary notification (where it is from an international organization[224]). While some members held an opposite view, the Commission took the view that, in this case, the time period should start as from the time the electronic mail or facsimile is sent. This would help prevent disputes as to the date of receipt of the confirmation and would not give rise to practical problems, since, according to the indications given to the Commission, the written confirmation is usually done at the same time the electronic mail or facsimile is sent or very shortly thereafter, at least by depositary international organizations. These clarifications are given in paragraph 4 of draft guideline 2.1.6.

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[223] See paragraph (13) above.

[224] A depositary notification has become the usual means by which depositary international organizations or heads of secretariat make communications relating to treaties. The usual diplomatic notes could nonetheless be used by an international organization in the case of a communication addressed to non-member States of the organization that do not have observer status.

(22) It seemed neither useful nor possible to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.[225] Similarly, the Commission took the view that it was wise to follow practice on the question of the organ to which, specifically, the communication should be addressed.[226]

(23) On the other hand, the second paragraph of draft guideline 2.1.6 reproduces the rule set out in paragraphs (b) and (c) of article 79 of the 1986 Vienna Convention.[227] However, it seemed possible to simplify the wording without drawing a distinction between cases in which the reservation is communicated directly by the author and instances in which it is done by the depositary. The expression "as the case may be" covers the hypothesis where a depositary exists. In this case the communication of the reservation to the depositary may produce effects directly, if only with respect to the depositary himself who is required to transmit it as soon as possible. That period of time can be assessed only in terms of the date on which he himself has received the communication; moreover, some members were of the view that many reservation clauses set the period of time as from that date.

(24) Paragraph 3 of draft guideline 2.1.6 deals with the specific case of the time period for the formulation of an objection to a reservation by a State or an international organization. It is based on the principle embodied in article 20, paragraph 5, of the 1986 Vienna Convention (itself based on the corresponding provision of the 1969 Vienna Convention), which reads:

> "… unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

It should be noted that, in such cases, the date of effect of the notification may differ from one State or organization to another depending on the date of reception.

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[225] Where the depositary is a State, it generally seems to transmit communications of this type in its official language(s); an international organization may use all its official languages (IMO) or one or two working languages (United Nations).

[226] Ministries of Foreign Affairs, Diplomatic Missions to the depositary State(s), Permanent Missions to the depositary organization.

[227] See paragraph (5).

2.1.7 Functions of depositaries

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, where appropriate, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(*a*) The signatory States and organizations and the contracting States and contracting organizations; or

(*b*) Where appropriate, the competent organ of the international organization concerned.

Commentary

(1) The section on reservations in the Vienna Conventions on the law of treaties makes no mention of the role of the depositary. This silence is explained by the decision, adopted belatedly during the elaboration of the 1969 Convention, to subsume the provisions relating to the communication of reservations within the general provisions of the 1969 Vienna Convention relating to depositaries.[228] Consequently, however, it is self evident that the provisions of articles 77 and 78 of the 1986 Convention[229] are fully applicable to reservations insofar as they are relevant to them. Draft guideline 2.1.7 performs this transposition.

(2) Under article 78, paragraph 1 (e), of the 1986 Convention, the depositary is responsible for "informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty". This rule, combined with the one in article 79 (a), is reproduced in draft guideline 2.1.6. This same draft implies also that the depositary receives and keeps custody of reservations;[230] it therefore seems unnecessary to mention this expressly.

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[228] See paragraph (1) of the commentary to draft article 73 adopted by the Commission on second reading in 1966, *Yearbook ... 1966*, vol. II, p. 270.

[229] Articles 76 and 77 of the 1969 Vienna Convention.

[230] See article 78, paragraph 1 (c): "… the functions of a depositary (…) comprise (…): (c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it".

(3) It goes without saying that the general provisions of article 77, paragraph 2, relating to the international character of the functions of depositaries and their obligation to act impartially apply to reservations as to any other field.[231] In this general form, these principles do not specifically concern the functions of depositaries in relation to reservations and, accordingly, there seems to be no need to reproduce them as such in the Guide to Practice. But these provisions should be placed in the context of those in article 78, paragraph 2:

> "In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:
>
> (*a*) the signatory States and organizations and the contracting States and contracting organizations; or
>
> (*b*) where appropriate, the competent organ of the international organization concerned."

(4) These substantial limitations on the functions of depositaries were enshrined as a result of problems that arose with regard to certain reservations; hence, it appears all the more essential to recall these provisions in the Guide to Practice, adapting them to the special case of reservations.

(5) The problem is posed in different terms when the depositary is a State that is itself a party to the treaty or when it is "an international organization or the chief administrative officer of the organization".[232] In the first case, "if the other parties found themselves in disagreement with the depositary on this question - a situation which, to our knowledge, has never materialized - they would not be in a position to insist that he follow a course of conduct different from the one he believed that he should adopt".[233] In contrast, in the second case, the political organs of the

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[231] "The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation."

[232] Article 77, paragraph 1, of the 1986 Vienna Convention.

[233] Jacques Dehaussy, "Le dépositaire de traités", *RGDIP* 1952, p. 515.

organization (composed of States not necessarily parties to the treaty) can give instructions to the depositary. It is in this context that problems arose and their solution has consistently tended towards a strict limitation on the depositary's power of judgement, culminating finally in the rules laid down in the 1969 Vienna Convention and reproduced in the 1986 Convention.

(6) As early as 1927, as a result of the difficulties created by the reservations to which Austria intended to subject its deferred signature of the International Opium Convention of 19 February 1925, the Council of the League of Nations adopted a resolution endorsing the conclusions of a Committee of Experts[234] and giving instructions to the Secretary-General of the League on what conduct to adopt.[235]

(7) But it is in the context of the United Nations that the most serious problems have arisen, as can be seen from the main stages in the evolution of the role of the Secretary-General as depositary in respect of reservations:[236]

- Initially, the Secretary-General "seemed to determine alone ... his own rules of conduct in the matter"[237] and subjected the admissibility of reservations to the unanimous acceptance of the contracting parties or the international organization whose constituent instrument was involved;[238]

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[234] See the report of the Committee, composed of Mr. Fromageot, Mr. MacNair and Mr. Diéna, in *JOSdN* 1927, p. 881.

[235] Resolution of 17 June 1927. See also resolution XXIX of the Eighth Conference of American States (Lima 1938), which established the rules to be followed by the Pan American Union with regard to reservations.

[236] See also, for example, Pierre-Henri Imbert, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités - Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire", *AFDI* 1980, pp. 528-529, or Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge University Press, 1987, pp. 429-434.

[237] Jacques Dehaussy, "Le dépositaire de traités", *RGDIP* 1952, p. 514.

[238] See the *Summary of the practice of the Secretary-General as depositary of multilateral treaties*, ST/LEG/8, New York, 1997, Sales No. E.94.V.15, pp. 50-51, paras. 168-171.

- Following the advisory opinion of the International Court of Justice of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[239] the General Assembly adopted its first resolution calling on the Secretary-General in respect of future conventions:

  "(i) To continue to act as depositary in connection with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

  (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications";[240]

- These guidelines were extended to all treaties for which the Secretary-General assumes depositary functions under resolution 1452 B (XIV) of 7 December 1959, adopted as a result of the problems related to the reservations formulated by India to the constituent instrument of the International Maritime Consultative Organization (IMCO).[241]

(8) This is the practice followed since then by the Secretary-General of the United Nations and, apparently, by all international organizations (or the heads of the secretariats of international organizations) with regard to reservations where the treaty in question does not contain a reservations clause.[242] And this is the practice that the International Law Commission drew on in formulating the rules to be applied by the depositary in this area.

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[239] *I.C.J. Reports 1951*, p. 15.

[240] Resolution 598 (VI) of 12 January 1952, para. 3 (b).

[241] See the commentary to draft guideline 2.1.5, paras. (23) and (24).

[242] See *Summary of the practice of the Secretary-General as depositary of multilateral treaties*, ST/LEG/8, New York, 1997, Sales No. E.94.V.15, pp. 60-61, paras. 177-188.

(9) It should also be noted that, once again, the formulation adopted tended towards an ever greater limitation on the depositary's powers:

- In the draft adopted on first reading in 1962, paragraph 5 of draft article 29 on "the functions of a depositary" provided that:

  > "On a reservation having been formulated, the depositary shall have the duty:
  >
  > (*a*) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;
  >
  > (*b*) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19";[243]

- The draft adopted on second reading in 1966 further provided that the functions of the depositary comprised:

  > "Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question";[244]

  The commentary on this provision dwelt, however, on the strict limits on the depositary's examining power:

  > "Paragraph 1 (d) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary's duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation. If an instrument or

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[243] *Yearbook ... 1962*, vol. II, p. 205.

[244] Draft art. 72, para. 1 (d), *Yearbook ... 1966*, vol. II, p. 293.

> reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention ...";[245]

- During the Vienna Conference, an amendment proposed by the Byelorussian Soviet Socialist Republic[246] further attenuated the provision in question: even if the disappearance of any express reference to reservations certainly does not prevent the rule laid down in article 77,[247] paragraph 1 (d), from applying to these instruments, the fact remains that the depositary's power is limited henceforth to examining the *form* of reservations, his function being that of:

> "Examining whether the signature or any instrument, notification or communication relating to the treaty is *in due and proper form* and, if need be, bringing the matter to the attention of the States in question."[248]

(10) In this way, the principle of the depositary as "letter box" was enshrined. As T.O. Elias has written: "It is essential to emphasize that it is no part of the depositary's function to assume the role of interpreter or judge in any dispute regarding the nature or character of a party's reservation vis-à-vis the other parties to a treaty, or to pronounce a treaty as having come into force when that is challenged by one or more of the parties to the treaty in question."[249]

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[245] Ibid., pp. 293-294, para. (4) of the commentary.

[246] See *Official Records of the United Nations Conference on the Law of Treaties, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference, First and Second Sessions*, A/CONF.39/11/Add.2, Sales No. E.70.V.5), para. 657 (iv) (4), p. 202, and para. 660 (i), p. 203.

[247] Article 78 in the 1986 Convention.

[248] The 1986 text (italics added).

[249] *The Modern Law of Treaties*, Oceana Publications/Sijthoff, Dobbs Ferry/Leiden, 1974, p. 213.

(11) Opinions are divided as to the advantages or disadvantages of this diminution of the depositary's competencies with regard to reservations. Of course, as the International Court of Justice emphasized in its 1951 opinion, "the task of the [depositary] would be simplified and would be confined to receiving reservations and objections and notifying them".[250] "The effect of this, it is suggested, is to transfer the undoubted subjectivities of the United Nations system from the shoulders of the depositary to those of the individual States concerned, in their quality of parties to that treaty, and in that quality alone. This may be regarded as a positive innovation, or perhaps clarification of the modern law of treaties, especially of reservations to multilateral treaties, and is likely to reduce or at least limit the 'dispute' element of unacceptable reservations."[251]

(12) Conversely, we may also see in the practice followed by the Secretary-General of the United Nations and embodied, indeed "solidified", in the 1969 Vienna Convention, "an unnecessarily complex system"[252] insofar as the depositary is no longer able to impose the least amount of coherence and unity in the interpretation and implementation of reservations.[253]

(13) The fact remains that distrust of the depositary, as reflected in the provisions analysed above of the relevant articles of the Vienna Conventions, is too deeply entrenched, both in minds and in practice, for there to be any consideration of revising the rules adopted in 1969 and

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[250] *I.C.J. Reports 1951*, p. 27; and it may be considered that: "It is that passage which has established the theoretical basis for the subsequent actions by the General Assembly and the International Law Commission. For it is in that sentence that the essentially administrative features of the function [of the depositary] are emphasized and any possible political (and that means decisive) role is depressed to the greatest extent" (Shabtai Rosenne, "The Depositary of International Treaties", *American Journal of International Law* 1967, p. 931).

[251] Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge University Press, 1987, pp. 435-436.

[252] Pierre-Henri Imbert, op. cit., p. 534; the author applies the term only to the practice of the Secretary-General and seems to consider that the Vienna Convention simplifies the context of the problem.

[253] The depositary can, however, play a not insignificant role in the "reservations dialogue" in reconciling opposing points of view, where appropriate. See also Henry Han, "The UN Secretary-General's treaty depositary function: legal implications", *BJIL* 1988, pp. 570-571; the author here dwells on the importance of the role that the depositary can play, but the article pre-dates the Vienna Conference.

perpetuated in 1986. In the Commission's view, there is little choice but to reproduce them verbatim[254] in the Guide to Practice, combining the relevant provisions of article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention in a single guideline and applying them only to the functions of depositaries with regard to reservations.

(14) The first paragraph of the draft guideline is based on the text of the first part of article 78, paragraph 1 (d), with express and exclusive reference to the approach that the depositary is to take to reservations. The second paragraph reproduces the text of paragraph 2 of the same article while limiting the situation envisaged to that sole function (and not to the functions of the depositary in general, as article 78 does).

2.1.8[2.1.7 bis] Procedure in case of manifestly [impermissible] reservations

Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

Commentary

(1) During the discussion of draft guideline 2.1.7, some members of the Commission considered that purely and simply applying the rules it establishes in the case of a reservation that was manifestly "impermissible" gave rise to certain difficulties. In particular, they stressed that there was no reason to provide for a detailed examination of the formal validity of the reservation by the depositary, as is done in the first paragraph of draft guideline 2.1.7, while precluding him from reacting in the case of a reservation that is manifestly impermissible.

(2) However, allowing him to intervene in the latter case constituted a progressive development of international law, which, it must be acknowledged, departs from the spirit in which the provisions of the Vienna Conventions on the functions of depositaries were drawn up.[255] This is why, during its fifty-third session, the Commission considered it useful to consult

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[254] See, however, draft guideline 2.1.8.

[255] See the commentary to draft guideline 2.1.7, paras. (9) and (10).

member States in the Sixth Committee of the General Assembly on the question whether the depositary could or should "refuse to communicate to States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of a treaty".[256]

(3) The nuanced responses given to this question by the delegations of States to the Sixth Committee have inspired the wording of draft guideline 2.1.8. Generally speaking, States have expressed a preference for the strict alignment of the Guide to Practice with the provisions of the 1969 Vienna Convention concerning the role of the depositary, in particular article 77 thereof. Some of the delegations that spoke stressed that the depositary must demonstrate impartiality and neutrality in the exercise of his functions and that he should therefore limit himself to transmitting to the parties the reservations that were formulated. However, a number of representatives on the Sixth Committee were of the view that, when a reservation is manifestly impermissible, it is incumbent upon the depositary to refuse to communicate it or at least to first inform the author of the reservation of its position and, if the author maintains the reservation, to communicate it and draw the attention of the other parties to the problem.

(4) Most of the members of the Commission supported this intermediate solution. They considered that it was not possible to allow any type of censure by the depositary, but that it would be inappropriate to oblige him to communicate the text of a manifestly impermissible reservation to the contracting or signatory States and international organizations without previously having drawn the attention of the reserving State or international organization to the defects that, in his opinion, affect it. Nevertheless, it should be understood that, if the author of the reservation maintains it, the normal procedure should resume and the reservation should be transmitted, indicating the nature of the legal problems in question. In point of fact, this amounts to bringing the procedure to be followed in the case of a manifestly "impermissible" reservation into line with the procedure followed in the case of reservations that give rise to problems of form: according to draft guideline 2.1.7, should there be a difference of opinion regarding such problems, the depositary "shall bring the question to the attention of: (a) The signatory States and organizations and the contracting States and contracting organizations; or (b) Where appropriate, the competent organ of the international organization concerned".

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[256] *Report of the International Law Commission on the work of the fifty-third session*, A/56/10, para. 25.

(5) According to some members of the Commission, this procedure should be followed only if the "impermissibility" invoked by the depositary is based on article 19 (a) and (b) of the 1969 and 1986 Vienna Conventions (a reservation that is prohibited by the treaty or not provided for in a treaty that authorizes only certain specific reservations). Other members considered that the only real problem is that of the compatibility of the reservation with the object and purpose of the treaty (art. 19 (c)). The Commission considered that it was not justified to make a distinction between the different types of "impermissibility" listed in article 19.

(6) Similarly, despite the contrary opinion of some of its members, the Commission did not consider that it was useful to confine the exchange of opinions between the author of the reservation and the depositary within strict time limits, as implied by draft guideline 2.1.7. That draft guideline does not derogate from draft guideline 2.1.6 (ii), according to which the depositary must act "as soon as possible". And, in any case, it is for the reserving State or international organization to advise whether it is willing to discuss the matter with the depositary. Should this not be the case, the procedure must follow its course and the reservation must be communicated to the other contracting parties or signatories.

(7) Although, to date, the Commission has used the word "impermissible" to characterize reservations covered by the provisions of article 19 of the Vienna Conventions, some members pointed out that this word was not appropriate in that case: in international law, an internationally wrongful act entails its author's responsibility,[257] and this is plainly not the case of the formulation of reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose. The Commission decided to leave the matter open until it had adopted a final position on the effect of these inconsistencies or incompatibilities; to this end, the word "impermissible" has been placed between square brackets and the Commission proposes to take a decision on this point in due course.

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[257] Cf. article 1 of the draft articles on responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 56/83 of 12 December 2001.

2.4 Procedure for interpretative declarations

Commentary

In view of the lack of any provision on interpretative declarations in the Vienna Conventions and the scarcity or relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. We can only proceed by analogy with (or in contrast to) reservations, taking great care, of course, to distinguish conditional interpretative declarations from those that are not conditional.[258]

2.4.1 Formulation of interpretative declarations

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

Commentary

(1) Draft guideline 2.4.1 transposes and adapts to interpretative declarations, as defined by draft guidelines 1.2,[259] the provisions of draft guideline 2.1.3 on the formulation of reservations.

(2) It goes without saying that these declarations can only produce effects, whatever their nature, if they emanate from an authority competent to engage the State or the international organization at the international level. And since the declaration purports to produce effects in relation to a treaty, it would seem appropriate to limit the option of formulating it to the authorities competent to engage the State or the organization through a treaty.

(3) With regard to the form of interpretative declarations, however, a very different problem arises than with regard to reservations; the former are declarations purporting to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions, without subjecting its consent to be bound to that interpretation. Except in the case of conditional interpretative declarations, which are dealt with in draft guideline 2.4.3, the author of

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[258] On the distinction, see draft guidelines 1.2 and 1.2.1 and the commentaries thereto (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), chap. IV, C, 2, pp. 223-249).

[259] For the text and the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), chap. IV, C, 2, pp. 223-240.

the declaration is taking a position,[260] but is not attempting to make it binding on the other contracting parties. Hence it is not essential for such declarations to be in writing, as it is in the case of reservations (draft guideline 2.1.1) or conditional interpretative declarations (draft guideline 2.4.3). It is certainly preferable that they should be known to the other parties, but ignorance of them would not necessarily void them of all legal consequences. Moreover, the oral formulation of such declarations is not uncommon and has not kept judges or international arbitrators from recognizing that they have certain effects.[261]

(4) Consequently, there is no need for a draft guideline on the form that simple interpretative declarations may take, since the form is unimportant. The silence of the Guide to Practice on that point should make this sufficiently clear.

(5) Also, there seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. There is no reason to transpose the corresponding parts of the provisions of draft guidelines 2.1.5 to 2.1.8 on the communication of reservations and it does not seem necessary to include a clarification of this point in the Guide to Practice.

[2.4.2 [2.4.1 bis] Formulation of an interpretative declaration at the internal level

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

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[260] One which can have "considerable probative value" when it contains "recognition by a party of its own obligations under an instrument" (cf. International Court of Justice, "Advisory Opinion of 11 July 1950 concerning the International Status of South-West Africa", *I.C.J. Reports 1950*, pp. 135-136; see the commentary to draft guideline 1.2.1. in *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), note 317, p. 236).

[261] See, ibid.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

Commentary

(1) In the Commission's opinion, the formulation of interpretative declarations at the internal level calls for the same comments as in the case of reservations. In this regard, national rules and practices are extremely diverse. This becomes clear from the replies of States to the Commission's questionnaire on reservations to treaties. Of the 22 States that replied to questions 3.5 and 3.5.1,[262]

- In seven cases, only the executive branch is competent to formulate a declaration;[263]
- In one case, only the Parliament has such competence;[264] and
- In 14 cases, competence is shared between the two,[265] and the modalities for collaboration between them are as diverse as they are with regard to reservations.

In general, the executive branch probably plays a more distinct role than it does in the case of reservations.

(2) It follows a fortiori that the determination of competence to formulate interpretative declarations and the procedure to be followed in that regard is purely a matter for internal law and that a State or an international organization would not be entitled to invoke a violation of internal law as invalidating the legal effect that its declarations might produce - especially since it appears that, in general, there is greater reliance on practice than on formal written rules.

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[262] Question 3.5: "At the internal level, what authority or authorities take(s) the decision to make such interpretative declarations?"; question 3.5.1: "Is the Parliament involved in the formulation of these declarations?" This list of States is not identical to the list of States that responded to similar questions on reservations.

[263] Chile, India, Israel, Italy, Japan, Malaysia and the Holy See.

[264] Estonia.

[265] Argentina, Bolivia, Croatia, Finland, France, Germany, Mexico, Panama, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United States of America.

(3) It is therefore appropriate to transpose to interpretative declarations, whether they are conditional or not, the provisions of draft guideline 2.4.2 on the formulation of reservations at the internal level, without it being necessary to make a distinction between conditional interpretative declarations and other interpretative declarations.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations

A conditional interpretative declaration must be formulated in writing.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

Commentary

(1) In the case of conditional interpretative declarations, there are, *prima facie*, few reasons for departing from the rules on form and procedure applicable to the formulation of reservations: even by definition, the State or international organization which formulates them subjects its consent to be bound to a specific interpretation.[266] The reasons which dictate that reservations should be formulated in writing and authenticated by a person who has the authority to engage the State or the international organization are therefore equally valid in this instance: since they are indissociably linked to the consent of their author to be bound, they must be known to their partners, by whom they may be challenged because they are intended to have effects on the treaty relationship. The procedure for formulating them should therefore be brought into line with that for reservations.

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[266] Cf. draft guideline 1.2.1.

(2) Draft guidelines 2.1.1 and 2.1.2 should therefore be transposed purely and simply with regard to the formulation of conditional interpretative declarations:

- They must be formulated in writing; and
- The same is true if the interpretative declaration must be formally confirmed in the conditions provided for in draft guideline 2.4.5.

This is set forth in the first two paragraphs of draft guideline 2.4.7.

(3) However, as all interpretative declarations must be formulated by a competent authority in order to engage the State,[267] it has not seemed useful to repeat this specifically in the case of conditional declarations. The same is true with regard to their formulation at the internal level.[268]

(4) Attention should nevertheless be drawn to the specificity of conditional interpretative declarations in respect of their communication to other interested States and international organizations. In this regard, the reasons which justify the transposition of the rules relating to the formulation of reservations to the formulation of such declarations are particularly compelling: at issue are, inevitably, formal declarations which, by definition, establish the conditions for their author's expression of consent to be bound by the treaty and to which other interested States and international organizations must have an opportunity to react. The last two paragraphs of draft guideline 2.4.7 are, consequently, modelled on the text of draft guideline 2.1.5, although the Commission has not considered it necessary to reproduce in detail the provisions of draft guidelines 2.1.6 to 2.1.8, the elements of which are, however, transposable mutatis mutandis to conditional interpretative declarations.

(5) The Commission reserves the option of reconsidering whether all the draft guidelines on conditional interpretative declarations, including draft guideline 2.4.7, should, in the light of the legal system applicable to them, be retained in the Guide to Practice. If it turns out that this system is substantially similar to that for reservations, all these draft guidelines will be replaced by a single provision equating these declarations with reservations. Pending its final decision in this regard, the Commission has adopted draft guideline 2.4.7 provisionally and has placed it between square brackets.

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[267] See draft guideline 2.4.1.

[268] See draft guideline 2.4.2.

CHAPTER V

DIPLOMATIC PROTECTION

A. Introduction

104. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[269] In the same year, the General Assembly in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[270] The Working Group submitted a report at the same session which was endorsed by the Commission.[271] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[272]

105. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

106. The General Assembly in paragraph 8 of its resolution 52/156 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

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[269] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 249 and annex II, addendum 1.

[270] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), chap. VIII.

[271] Ibid., para. 171.

[272] Ibid., paras. 189-190.

107. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.[273] At the same session, the Commission established an open-ended Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.[274]

108. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John R. Dugard Special Rapporteur for the topic,[275] after Mr. Bennouna was elected a judge to the International Criminal Tribunal for the Former Yugoslavia.

109. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1). The Commission deferred its consideration of A/CN.4/506/Add.1 to the next session, due to the lack of time. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[276] The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

110. At its fifty-third session, in 2001, the Commission had before it the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1), as well as his second report (A/CN.4/514 and Corr.1 and 2 (Spanish only)). Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of document A/CN.4/514, concerning draft articles 12 and 13, to the next session. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, held on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, held on 17 July 2001.

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[273] A/CN.4/484.

[274] The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 108.

[275] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 19.

[276] The report of the informal consultations is contained in *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 495.

111. At its 2688th meeting, the Commission established an open-ended Informal Consultation on article 9, chaired by the Special Rapporteur.

B. Consideration of the topic at the present session

112. At the present session, the Commission had before it the remainder of the second report of the Special Rapporteur (A/CN.4/514 and Corr.1 and 2 (Spanish only)), concerning draft articles 12 and 13, as well as his third report (A/CN.4/523 and Add.1). The Commission considered the remaining parts of the second report, as well as the first part of the third report, concerning the state of the study on diplomatic protection and articles 14 and 15, at its 2712th to 2719th and 2729th meetings, held on 30 April to 14 May and 4 June 2002, respectively. It subsequently considered the second part of the third report, concerning article 16, at its 2725th, 2727th to 2729th meetings, held on 24 May, 30 May to 4 June, respectively.

113. At its 2740th meeting, held on 2 August 2002, the Commission established an open-ended Informal Consultation, to be chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

114. The Commission decided to refer draft article 14, paragraphs (a), (b), (d) (to be considered in connection with paragraph (a)), and (e) to the Drafting Committee at its 2719th meeting, held on 14 May 2002. It further decided, at its 2729th meeting, held on 4 June 2002, to refer draft article 14, paragraph (c) to the Drafting Committee to be considered in connection with paragraph (a).

115. The Commission considered the report of the Drafting Committee on draft articles 1 to 7 [8], at its 2730th to 2732nd meetings, held from 5 to 7 June 2002. It adopted articles 1 to 3 [5] at its 2730th meeting, 4 [9], 5 [7] and 7 [8] at its 2731st meeting, and 6 at its 2732nd meeting (see section C, below).

116. At its 2745th and 2746th meetings, held on 12 and 13 August 2002, the Commission adopted the commentaries to the aforementioned draft articles.

1. General comments on the study

(a) Introduction by the Special Rapporteur

117. The Special Rapporteur, in introducing his third report (A/CN.4/523), noted that diplomatic protection was a subject on which there was a wealth of authority in the form of codification attempts, conventions, State practice, jurisprudence and doctrine. No other branch

of international law was so rich in authority. However, practice was frequently inconsistent and contradictory. His task was to present all the authorities and options so that the Commission could make an informed choice.

118. As to the scope of the draft articles, the Special Rapporteur reiterated his reluctance to go beyond the traditional topics falling within the subject of diplomatic protection, namely nationality of claims and the exhaustion of local remedies. However, he observed that, during the course of debate in the previous quinquennium, suggestions had been made to include a number of other matters within the field of diplomatic protection, such as functional protection by international organizations of their officials, the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned, the case where one State exercises diplomatic protection of a national of another State as a result of the delegation of such a right, and the case where a State or an international organization administers or controls a territory. In response, while noting the importance of those issues, he maintained that they should not be considered by the Commission in the context of the present set of draft articles, especially if it intended to adopt the draft articles on second reading by the end of the quinquennium. Furthermore, he cautioned that the debate on some of those issues, for example that of the case where a State or an international organization administered or controlled a territory, could go well beyond the traditional field of diplomatic protection.

119. In addition, he noted that it was difficult for the Commission to complete a study on diplomatic protection without examining denial of justice and the Calvo clause, both of which had featured prominently in the jurisprudence on the subject.

120. The Special Rapporteur further confirmed his intention to consider in his next report the nationality of corporations.

(b) Summary of the debate

121. The Special Rapporteur was congratulated on his report, and on the open-minded manner in which he approached the issues at hand. At the same time, the view was expressed that the Special Rapporteur's approach appeared to be too generalist. Hence, support was expressed for the consideration of the additional issues listed by the Special Rapporteur in his third report.

122. The view was expressed that the question of functional protection by international organizations of their officials should be excluded from the draft articles since it constituted an exception to the nationality principle, which was fundamental to the issue of diplomatic protection. In the *Reparation for injuries* Advisory Opinion,[277] the International Court of Justice had made it clear that the claim brought by the Organization was based not on the nationality of the victim, but on his status as an agent of the Organization. Similarly, in its judgement of 11 September 1964,[278] the Administrative Tribunal of the International Labour Organization (ILO) had stated that the privileges and immunities of ILO officials were granted solely in the interests of the Organization.

123. Conversely, it was proposed that the Commission should consider the consequences for the State of nationality of an international organization's entitlement to exercise protection. The question of the competing claims of the State of nationality and the United Nations with regard to personal injuries to United Nations officials had been raised by the International Court of Justice in the *Reparation for Injuries* Opinion. It was proposed that the relationship between functional protection and diplomatic protection be studied closely, with some reference to functional protection being made in the draft articles. Similarly, it was suggested that it be made clear that, as the Court had noted in its advisory opinion, the possibility of competition between the State's right of diplomatic protection and the organization's right of functional protection could not result in two claims or two acts of reparation. Hence the Commission could consider the need to limit claims and reparations.

124. It was also noted that the question of functional protection of their officials by international organizations was of interest to small States some of whose nationals were employed by international organizations for, if the possibility of protection rested solely with the State of nationality, there would be a risk of inequality of treatment.

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[277] *Reparation for Injuries Suffered in the Service of the United Nations,* 1949 *I.C.J. Reports*, p. 174.

[278] *In re Jurado*, Judgment No. 70.

125. Others questioned whether such protection could be characterized as diplomatic protection. If the Commission agreed to exclude protection of diplomatic and consular officials from the scope of the topic, the same logic would apply to officials of international organizations. Similarly, members of armed forces were normally protected by the State in charge of those forces, but protection as such was not regarded as "diplomatic protection".

126. In terms of a further view, the distinction between diplomatic and functional protection did not necessarily apply in the context of diplomatic protection exercised on behalf of members of the armed services. Such cases represented an application of the legal interests of the State to whom the troops in question belonged. While the link of nationality was the major expression of legal interest in States' nationals, national corporations and agencies, the law recognized other bases for legal interest, such as membership in the armed forces.

127. In support of the proposal to extend the scope of the draft articles to cover diplomatic protection of crew members and passengers on ships, the example was cited of *The M/V "Saiga"* case[279] where the International Tribunal for the Law of the Sea found that the ship's State of nationality was entitled to bring a claim for injury suffered by members of the crew, irrespective of their individual nationalities; thus, the State of nationality did not possess an exclusive right to exercise diplomatic protection. At the same time, caution was advised regarding the *M/V Saiga* case, which had been brought before the International Tribunal for the Law of the Sea under the special provisions contained in article 292 of the United Nations Convention on the Law of the Sea,[280] and not as a general case of diplomatic protection.

128. It was also noted that the evolution of international law was characterized by increasingly strong concern for respect for human rights. Hence, it was suggested that, if crew members could receive protection from the State of nationality of the vessel or aircraft, that merely provided increased protection and should be welcomed.

129. Others maintained that the Special Rapporteur was correct to propose that the Commission exclude from the scope of the draft articles the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew or passengers. It was stated that the issue

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[279] *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* International Tribunal for the Law of the Sea, Judgment of 1 July 1999.

[280] United Nations, *Treaty Series*, vol. 1833, p. 3.

was not how a State should protect its nationals abroad, but rather how to avoid conflicting claims from different States. If the ship flew a flag of convenience, the State of registration would have no interest in exercising diplomatic protection should the crew's national Governments fail to do so. Such cases would, according to this view, in any event be covered by the law of the sea.

130. It was also observed that the question of the protection of a ship's crew was covered both by the United Nations Convention on the Law of the Sea, but also in earlier international agreements. Closer examination of other international instruments was thus called for.

131. It was also observed that the legal principles regulating questions relating to the nationality of aircraft were already set out in international law, in particular in many instruments, such as the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.[281] There, the determining factor was the special link between the State of nationality or the State of registry and a given ship or aircraft. It did not involve persons and, although the international instruments in question in certain instances granted a State the right to exercise prerogatives which might, at first glance, have a similarity with diplomatic protection, that protection was of another nature. Thus, such questions had no place in the consideration of the subject of diplomatic protection.

132. Disagreement was expressed with the Special Rapporteur's suggestion that the Commission not consider the case of a State exercising diplomatic protection of a national of another State as a result of the delegation of such a right. At issue was the means of implementing State responsibility. Therefore, there was in principle no reason why a State could not exercise diplomatic protection in such circumstances. Others noted that if diplomatic protection was viewed as a discretionary right of the State, the point could be made in the commentary that the State had a right to delegate to other subjects of international law the exercise of diplomatic protection on behalf of its citizens or of other people with genuine links to it within the framework of the established exceptions to the nationality principle. However, what was important was not to confuse the rules relating to diplomatic protection with other types of protection of individuals or their interests.

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[281] United Nations, *Treaty Series*, vol. 704, p. 218.

133. Support was expressed for the Special Rapporteur's view that the draft articles ought not consider the case where an international organization controls a territory. It was noted that it involved a very specific form of protection, one at least as closely related to functional protection as to diplomatic protection; and, as in the case of the articles on State Responsibility, the Commission should disregard all issues relating to international organizations. At the same time, support was expressed for the proposal that the draft articles should consider the situation where a State administering or controlling a territory not its own purports to exercise diplomatic protection on behalf of the territory's inhabitants.

134. In terms of another view, in the case where an international organization administers a territory, the international organization fulfils all the functions of a State and should accordingly exercise diplomatic protection in respect of persons who might be stateless or whose nationality was not clear. Furthermore, while the link of nationality had been of some importance in the past, when States had been the sole actors on the international stage, it had become less important in a world where international organizations had an increasingly larger role to play alongside States. It was accordingly suggested that the issue be covered by the draft articles. Conversely, it was stated that it was risky to assume that the special and temporary functions which were transferred to, for example, the United Nations as administrator of a territory, were analogous to the administration of territories by States.

135. In terms of a further view, it was maintained that the core of the issue of diplomatic protection was the nationality principle, i.e. the link between a State and its nationals abroad. When a State claimed a legal interest in the exercise of diplomatic protection for an internationally wrongful act derived from an injury caused to its national, the link between the legal interest and the State was the nationality of the national. If, the proposed additional issues where covered in the draft articles, even as exceptional cases, it was opined that they would inevitably affect the nature of the rules on diplomatic protection, unduly extending the right of States to intervene.

136. It was also suggested that if the Commission were to decide not to consider those additional issues, they should at least be mentioned in the commentary.

137. The Commission further considered several other suggestions for issues that could be included within the scope of the draft articles. It examined the question of whether it might be necessary to include a reference in the draft articles to the "clean hands" doctrine. The view was expressed that while the doctrine was relevant to the discussion on diplomatic protection, it could not be given special treatment in the draft articles. The example was cited of the treatment of the doctrine in the context of the Commission's work on the topic of State responsibility, where the Commission decided that it did not constitute a circumstance precluding wrongfulness.[282] Similarly, it was suggested that the fact that a person did not have "clean hands" would not warrant a deprivation of diplomatic protection. Further reservations were expressed about the legal status of the "clean hands" concept. It was noted that it was little used, and then mainly as a prejudice argument, and the Commission had to be careful not to legitimate it "accidentally".

138. On the other hand, it was stated that it was legitimate to raise the issue in connection with diplomatic protection. The question whether or not the person on behalf of whom diplomatic protection was exercised had "clean hands" could not be ignored and, whatever the conclusions drawn therefrom, it was important for the issue to be raised. Still others noted that the Commission should best not take any position on the "clean hands" rule either way.

139. The Commission also considered the necessity of including a provision on denial of justice.[283] It was recalled that the Commission had previously not envisaged referring to it explicitly in the draft articles. It was also maintained that the concept of denial of justice was part of substantive law and of the subject of the treatment of aliens, and not directly related to diplomatic protection. It happened that, when aliens used the courts, there was sometimes a denial of justice and that could happen quite apart from any circumstances involving recourse to local remedies as such. To take up the subject would thus be illogical and would involve the Commission in enormous difficulties.

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[282] See, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), chap. V.B.48 (a), paras. 411-415.

[283] See too section B.6, below.

140. Conversely, it was pointed out that the question of denial of justice touched on a substantive problem inasmuch as it concerned equal treatment of aliens and nationals with regard to access to judicial systems. That subject was extensively treated in private international law and conventions existed on the subject, particularly at the inter-American level, which provided for the right of aliens to have access to the same remedies as nationals - a right reaffirmed by other more recent texts. As such, it was difficult to disregard the question of denial of justice, which could be one of the situations giving rise to the exercise of diplomatic protection.

141. In terms of other suggestions, it was proposed that some thought be given to considering the effects of the exercise of diplomatic protection as part of the present study.

142. Support was also expressed for the Special Rapporteur's proposal to consider the question of the diplomatic protection of corporations.

143. As to the use of terms, it was pointed out that the concept of "nationality of claims" was confusing and, as a common law concept, did not have its analogue in certain other legal systems. In response, the Special Rapporteur acknowledged that the phrase had a common law connotation, but pointed out that it had been used also in French by the International Court of Justice in the *Reparation for injuries* opinion.

(c) Special Rapporteur's concluding remarks

144. The Special Rapporteur observed that, in general, there seemed to be support for his desire to confine the draft articles to issues relating to the nationality of claims and to the exhaustion of local remedies rule so that it might be possible to conclude the consideration of the topic within the Commission's quinquennium.

145. As regards the issues identified in his third report which were linked to the nationality of claims, but did not traditionally fall within that field, the Special Rapporteur noted that there had been no support for a full study of functional protection by organizations of their officials. However, several speakers had stressed the need to distinguish between diplomatic protection and functional protection in the commentary, with special reference to the Court's reply to question II in the *Reparation for injuries* opinion on how the exercise of functional protection by the United Nations was to be reconciled with the right of the State of nationality to protect its

nationals. He proposed to deal with the matter in the context of competing claims of protection within the commentary to article 1, although he was still open to the possibility of including a separate provision on the subject.

146. The Special Rapporteur noted that there was a division of opinion on the proposal to expand the draft articles to include the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the latter's crew and passengers. He noted that further consideration would be given to the matter.

147. As to the case in which one State delegated the right to exercise diplomatic protection to another State, he observed that it did not arise frequently in practice and there was very little discussion of it in the literature. He also noted that the issue was partly dealt with in the context of the article on continuous nationality.

148. The Special Rapporteur noted further that there had been some, albeit little, support for the proposal to include within the scope of the study the exercise of diplomatic protection by a State which administered, controlled or occupied a territory. He noted furthermore that some members had proposed the consideration of the question of protection by an international organization of persons living in a territory which it controlled, such as the United Nations in Kosovo and East Timor. While there had been some support for the idea, in his view, the majority of the Commission believed that the issue might be better addressed in the context of the responsibility of international organizations.

149. As regards the "clean hands" principle, the Special Papporteur noted that it could arise in connection with the conduct of the injured person, the claimant State or the respondent State, thus making it difficult to formulate a rule applicable to all cases. He also observed that the issue would be covered in the addendum to his third report[284] and in connection with the nationality of corporations in the context of the *Barcelona Traction* case.[285]

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[284] A/CN.4/523/Add.1.

[285] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3.

2. Articles 12 and 13[286]

(a) Introduction by the Special Rapporteur

150. The Special Rapporteur recalled that articles 12 and 13 were taken up in his second report, submitted at the fifty-third session of the Commission in 2001, but were not considered then for lack of time. He observed that the two provisions should be read together, and thus proposed to deal with them jointly. Both concerned the question of whether the exhaustion of the local remedies rule was one of procedure or of substance - one of the most controversial issues in the field of exhaustion of local remedies.

151. It was noted that the Commission had previously taken a position on the matter, in the context of the topic State responsibility. He recalled that a provision had been adopted in 1977 and confirmed in 1996 as part of the first reading of the draft articles on that topic.[287] However, in his view, the rule was essentially one of procedure rather than of substance, and the matter had therefore to be reconsidered.

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[286] Articles 12 and 13 read:

Article 12

> The requirement that local remedies must be exhausted is a procedural precondition that must be complied with before a State may bring an international claim based on injury to a national arising out of an internationally wrongful act committed against the national where the act complained of is a breach of both local law and international law.

Article 13

> Where a foreign national brings legal proceedings before the domestic courts of a State in order to obtain redress for a violation of the domestic law of that State not amounting to an international wrong, the State in which such proceedings are brought may incur international responsibility if there is a denial of justice to the foreign national. Subject to article 14, the injured foreign national must exhaust any further local remedies that may be available before an international claim is brought on his behalf.

(A/CN.4/514).

[287] Art. 22. See *Yearbook ... 1977*, vol. II (Part Two), para. 31; *Yearbook ... 1996*, vol. II (Part Two), para. 65.

152. There were three positions: the substantive, the procedural and what he called the "mixed" position. Those in favour of the substantive position, including Borchard and Ago, maintained that the internationally wrongful act of the wrongdoing State was not complete until the local remedies had been exhausted. There, the exhaustion of local remedies rule was a substantive condition on which the very existence of international responsibility depended.

153. Those who supported the procedural position, for example Amerasinghe, argued that the exhaustion of local remedies rule was a procedural condition which must be met before an international claim could be brought.

154. The mixed position, argued by Fawcett, drew a distinction between an injury to an alien under domestic law and an injury under international law. If the injury was caused by the violation of domestic law alone and in such a way that it did not constitute a breach of international law, for instance through a violation of a concessionary contract, international responsibility arose only from the act of the respondent State constituting a denial of justice, for example, bias on the part of the judiciary when an alien attempted to enforce his rights in a domestic court. In that situation, the exhaustion of local remedies rule was clearly a substantive condition that had to be fulfilled. On the other hand, if the injury to the alien violated international law, or international law and domestic law, international responsibility occurred at the moment of injury, and the exhaustion of local remedies rule was a procedural condition for bringing an international claim.

155. The Special Rapporteur observed further that, while some had argued that the three positions were purely academic, the question of the time at which international responsibility arose was often of considerable practical importance. Firstly, in respect of the nationality of claims, the alien must be a national at the time of the commission of the international wrong. Hence, it was important to ascertain at what time the international wrong had been committed. Secondly, there might be a problem of jurisdiction, as had happened in the *Phosphates in Morocco* case,[288] where the question had arisen as to when international responsibility occurred for the purpose of deciding whether or not the court had jurisdiction. Thirdly, it would not be possible for a State to waive the exhaustion of local remedies rule if the rule was a substantive one, as no international wrong would be committed in the absence of the exhaustion of local remedies.

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[288] 1938 *P.C.I.J. Reports, Series A/B, No. 74*.

156. The Special Rapporteur noted the difficulty that the sources were not clear as to which approach should be followed. He further summarized various previous attempts at codification, as described in his report. He stated that while, in 1977, the Commission had preferred the substantive view in its then article 22 of the draft articles on State responsibility, in 2000 the Rapporteur of the Committee on Diplomatic Protection of Persons and Property had taken a purely procedural position in the International Law Association.[289]

157. The Special Rapporteur further observed that judicial decisions were also vague and open to different interpretations that lent support for either the procedural or the substantive position. For example, concerning the *Phosphates in Morocco* case, Special Rapporteur Ago had maintained that the Permanent Court had not ruled against the substantive position. However, the current Special Rapporteur's interpretation of a key passage in the decision was that the Court had supported the French argument that the local remedies rule was no more than a rule of procedure.

158. The Special Rapporteur also noted that State practice was of little value, because it usually took the form of arguments presented in international proceedings and, inevitably, a State was bound to espouse the position that best served its own interests. Hence, no clear conclusion could be drawn from arguments put forward by States.

159. Furthermore, it was noted that academic opinion was also divided on the issue. He acknowledged that the third position, which he preferred, had received little attention. For example, a State which tortured an alien incurred international responsibility at the moment when the act was committed, but it might also find itself in violation of its own legislation. If a domestic remedy existed, it must be exhausted before an international claim could be raised; in such a case, the local remedies rule was procedural in nature. Draft articles 12 and 13 sought to give effect to that conclusion, and academic opinion offered some support for such a position.

160. The Commission was also faced with the decision to depart from the position it had adopted in former article 22 of the draft articles on State responsibility. However, in proposing that article, the then Special Rapporteur on State responsibility had assumed that the document in

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[289] "The Exhaustion of Local Remedies", interim report of the International Law Association, *Report of the Sixty-ninth Conference (2000)*, p. 629

its final form would distinguish between obligations of conduct and result, a distinction which had not been retained on second reading. Hence, in the Special Rapporteur's view, the Commission was free to adopt the position he was proposing.

(b) Summary of the debate

161. In support of the substantive position, it was observed that where local remedies were required to be, and had not been, exhausted, diplomatic protection could not be exercised. Therefore, no claim in relation to an alleged breach could be put forward and countermeasures could not be taken. As such, it was not clear what the practical significance was of an alleged breach which had no consequences at the international level for either the State or the individual concerned, and for which no remedy was available. As such, since the precondition applied to all procedures relating to such a case, it must be regarded as substantive.

162. Others expressed support for the procedural position. It was observed, in connection with the rendering of a declaratory judgement in the absence of exhaustion of local remedies, that the exhaustion of local remedies was not always a practical possibility, for example, because of the prohibitive cost of the procedure. A declaratory judgement obtained in the absence of the exhaustion of local remedies could be a potentially significant satisfaction leading to practical changes. Such a possibility would, however, be precluded if the exhaustion of local remedies rule was characterized as substantive.

163. A preference was also expressed for the "third view" espoused by Fawcett, as described by the Special Rapporteur in his report. Conversely, the view was expressed that the various possibilities mentioned in Fawcett's study relating to the distinction between remedies available under domestic law and those available under international law might lead to a theoretical debate that would complicate the issue unnecessarily.

164. The prevailing view in the Commission was that draft articles 12 and 13 should be deleted since those articles added nothing to article 11. It was recognized that while some implications might follow from the adoption of one or another of the theories, and that the question whether such remedies were substantive or procedural in nature was, to some extent, inescapable in special circumstances such as those of the *Phosphates in Morocco* case, they were not of primary importance and did not justify inclusion of the draft articles in question.

Similarly, it was stated that the distinction was not very useful or relevant as a global approach to the problem of the exhaustion of local remedies. Nor was it of much practical purpose. Indeed, the concern was expressed that such a distinction could greatly complicate the Commission's task, since it would involve detailed consideration of the remedies to be exhausted. It was also stated that articles 12 and 13 either duplicated the statement of the principle contained in articles 10 and 11, or else merely pointed to notions, such as denial of justice, which they failed fully to articulate.

165. Furthermore, it was noted that when viewed purely in the context of diplomatic protection, the distinction seemed to lose its relevance. The postulate was that an internationally wrongful act had been committed; the only question to be considered was thus on what conditions - and perhaps, under what procedures - reparation could be required when an individual was injured; for in the absence of an internationally wrongful act, diplomatic protection would not arise. Seen from that perspective, the issue was straightforward: diplomatic protection was a procedure whereby the international responsibility of the State could be implemented; exhaustion of local remedies was a prerequisite for implementation of that procedure; and whether it was a substantive or a procedural rule made little difference.

166. It was recalled that the distinction had initially been made in the context of the determination of the precise moment when an unlawful act was committed during the consideration of the topic of State responsibility. The question was whether the responsibility of the State came into play as soon as the internationally wrongful act was committed, independently of the exhaustion of local remedies. It was proposed, therefore, that, in the interests of harmonization, the Commission follow the approach taken in article 44, "Admissibility of claims", of the draft articles on State responsibility. Similarly, it was noted that the drafting of article 12 was open to question: it was queried how a breach of local law could of itself constitute an internationally wrongful act. That seemed to contradict both the spirit and the letter of the articles on State responsibility for internationally wrongful acts, and, in particular, article 3 thereof.

167. In addition, some speakers took issue with the assertion that waivers were inconsistent with the substantive nature of the local remedies rule. States could waive a precondition for admissibility with regard to either a substantive or a procedural issue. Rules of exhaustion of local remedies were not peremptory in nature but were open to agreement between States.

168. It was further noted that the question of the nature of the local remedies rule raised difficult theoretical questions and had political implications since the procedural theory was perceived as belittling the importance of a rule that many States considered fundamental. In view of those problems and the lack of consensus within the Commission, it was considered unwise to endorse any of the competing views.

169. The view was also expressed that the Commission might instead consider an empirical study of the local remedies rule on the basis of policy, practice and history. For example, it was stated that the principle of assumption of risk, the existence of a voluntary link between the alien and the host State and the common sense application of the local remedies could be of greater relevance than issues of procedure or substance.

170. In terms of a further suggestion, the issue could be treated in the commentaries to articles 10, 11 and 14.

171 Others maintained that articles 12 and 13 were useful, but not in the form presented. The view was expressed that the local remedies rule, while being a procedural matter, could have substantive outcomes as well. It was thus proposed that exceptions be created to take account of situations where the application of the rule could be unfair, such as when there was a change of nationality or refusal to accept the jurisdiction of an international court. In such a case, it would be necessary to establish the time from which the right of the State to claim diplomatic protection ran, and that would probably be when the injury to the national of that State occurred. If worded in those terms, articles 12 and 13 would not duplicate article 10.

172. The suggestion was also made that only article 12 be referred to the Drafting Committee, and article 13 deleted as being outside the scope of the draft articles since it dealt with a situation where injury was the result of a violation of domestic law.

(c) Special Rapporteur's concluding remarks

173. The Special Rapporteur confirmed that he did not have a strong preference for retaining the distinction between the procedural and substantive positions in the draft articles. He agreed with the assertion that it was not a general framework for the study of diplomatic protection. However, it could not be entirely ignored in a study on exhaustion of local remedies, as it had featured prominently in the first reading of the draft articles on State responsibility, specifically article 22 thereof, as well as in all the writings on the local remedies rule. It also had practical implications in determining the time when the injury occurred, which was an issue that arose in respect of nationality of claims, because the injured alien must be a national of the State in question at the time the injury occurred.

174. In response to the suggestion that it would have been more helpful to offer a rationale of the exhaustion of local remedies rule by considering the reasons for which international law had established it, he observed that his first report had included an introductory section on the rationale of the local remedies rule, but that it had not been particularly well received by the Commission. He would further remedy the omission in the commentary on article 10.

175. He observed that articles 12 and 13 had been subjected to considerable criticism and had not been met with general approval. They had been viewed as too conceptual, irrelevant, premised on the dualist position and overly influenced by the distinction between procedure and substance. He conceded that some criticisms of article 13 were well-founded. He cited as an example the fact that diplomatic protection came into play where an international rule had been violated, whereas article 13 dealt mainly with situations where no international wrong had yet occurred. He also noted that some members had pointed out that article 13 dealt mainly with the issue of when an internationally wrongful act was committed; thus, it clearly did not fall under the exhaustion of local remedies rule.

176. Therefore he proposed that articles 12 and 13 not be referred to the Drafting Committee, a solution which would have the advantage of avoiding the question whether the exhaustion of local remedies rule was procedural or substantive in nature and would leave members free to hold their own opinions on the matter.

3. Article 14

(a) Futility (art. 14 (a))[290]

(i) Introduction by the Special Rapporteur

177. In introducing article 14, the Special Rapporteur noted that he was proposing an omnibus provision which dealt with exceptions to the exhaustion of local remedies rule. It responded to the suggestion made both in the Commission and the Sixth Committee of the General Assembly that it was only "all available adequate and effective local legal remedies" that ought to be exhausted. He could accept the suggestion that the general provision on the exhaustion of local remedies required that local remedies be both available and effective, provided that a separate provision was devoted to the ineffectiveness or futility of local remedies. The main reason was that, as stated in his proposed article 15, the burden of proof was on both the respondent State and the claimant State, the former having to show that local remedies were available, whereas the latter had to prove that local remedies were futile or ineffective.

178. He suggested that the term "ineffective" should be discarded as being too vague. Instead, he submitted three tests, grounded in judicial decisions and the literature, for determining what an "ineffective" local remedy was. Local remedies were ineffective where they were "obviously futile", offered "no reasonable prospect of success" or provided "no reasonable possibility of an effective remedy".

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[290] Article 14 (a) reads:

Article 14

Local remedies do not need to be exhausted where:

(a) the local remedies:

- are obviously futile (option 1)
- offer no reasonable prospect of success (option 2)
- provide no reasonable possibility of an effective remedy (option 3);

...

(A/CN.4/523).

179. It was noted that the first test, "obvious futility", which required the futility of the local remedy to be immediately apparent, had been criticized by authors, as well as by the International Court of Justice in the *ELSI* case,[291] as being too strict. Similarly, the second test, that the claimant should prove only that local remedies "offer no reasonable prospect of success", had been deemed too weak. The third test, a combination of the first two, under which local remedies "provide no reasonable possibility of an effective remedy", was, in his view, the one that should be preferred.

180. In support of his position, he cited circumstances in which local remedies had been held to be ineffective or futile: where the local court had no jurisdiction over the dispute (for example, in the *Panevezys-Saldutiskis Railway* case[292]); where the local courts were obliged to apply the domestic legislation at issue, for example, legislation to confiscate property; where the local courts were notoriously lacking in independence (for example, in the *Robert E. Brown* claim[293]); where there were consistent and well-established precedents that were adverse to aliens; and where the respondent State did not have an adequate system of judicial protection.

(ii) Summary of the debate

181. General support was expressed for the referral of paragraph (a) to the Drafting Committee. In particular, support was expressed for the third option, whereby a remedy must be exhausted only if there was a reasonable possibility of an effective remedy.

182. It was noted that the futility of local remedies was a complex issue because it involved a subjective judgement and because of its relationship to the burden of proof; it raised the question of whether a State of nationality could bring a claim before an international court on the sole assumption that local remedies were for various reasons futile. It was important to prevent extreme interpretations in favour of either the claimant State or the host State. As such, it was suggested that the third option was preferable as a basis for drafting a suitable provision, since it covered an adequate middle ground and offered a balanced view.

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[291] *Elettronica Sicula S.p.A. (ELSI)*, 1989 *I.C.J. Reports*, p. 14.

[292] 1939 *P.C.I.J. Series A/B, No. 76*, p. 4.

[293] 6 *U.N.R.I.A.A.*, p. 120 (1923).

183. At the same time, it was observed that the test of ineffectiveness must be an objective one. Such was the case, for example, where local remedies were unduly and unreasonably prolonged or unlikely to bring effective relief, or where local courts were completely subservient to the executive branch.

184. The view was expressed, however, that whatever option was adopted, the terms proposed left very considerable scope for subjective interpretation, whether of the term “futile” or of the term “reasonable”. The criterion of reasonableness was vague and related to the problem of the burden of proof, and was thus related to the Special Rapporteur’s proposal for article 15. However, it was noted that article 15 failed to provide a limitation to the apparent arbitrariness of the criterion adopted in article 14. Furthermore, it was pointed out that “effective remedy” and “undue delay” were relative concepts, in respect of which no universal standards were possible. As such, they must be judged in the light of the particular context and circumstances, and on the basis of other equally important principles: equality before the law, non-discrimination, and transparency. It was also suggested that for an individual to be deemed to have exhausted local remedies, it was not enough for a case to have been brought before the competent domestic court; the claimant must also have put forward the relevant legal arguments.

185. Several drafting suggestions were made, including, referring to “remedy” in the singular, in the chapeau of paragraph (a), so as to avoid general statements about whether all remedies were available; deleting the reference to the term “reasonable” which was superfluous, and implied *a contrario* that people would behave unreasonably unless specifically instructed to behave reasonably; that reference be made to all “adequate and effective” local remedies; and that the words “reasonable possibility” be scrutinized since they denoted a subjective assessment by the claimant State. It was also noted that article 14 (a) seemed to overlap with paragraphs (c), (d), (e) and (f), which dealt with specific situations for which there might be no possibility of an effective remedy.

186. Support was also expressed for a combination of options two and three. In terms of another view, the exhaustion of local remedies rule should be respected unless local remedies were obviously futile (i.e. option one). However, it was stated that the test of obvious futility would be too stringent.

(iii) Special Rapporteur's concluding remarks

187. The Special Rapporteur recalled that it had been suggested at the 2001 session of the Commission, and subsequently at the meeting of the Sixth Committee later that year, that the concept of effectiveness should be dealt with only as an exception. He hoped that the Commission's silence on that subject indicated support for that position.

188. He observed that there had been unanimous support for referring article 14 (a) to the Drafting Committee; and that most members had favoured option three, although there had been some support for a combination of options two and three; with little support for option one. He therefore suggested that article 14 (a) should be referred to the Drafting Committee with a mandate to consider both options 2 and 3.

(b) Waiver and estoppel (art. 14 (b))[294]

(i) Introduction by the Special Rapporteur

189. In introducing paragraph (b), which dealt with waiver and estoppel, the Special Rapporteur observed that since the local remedies rule was designed to benefit the respondent State, it could elect to waive it. Waiver might be express or implied or it might arise as the result of the conduct of the respondent State, in which case it might be said that the respondent State was estopped from claiming that local remedies had not been exhausted. He noted further that an express waiver might be included in an ad hoc arbitration agreement to resolve an already existing dispute; it might also arise in the case of a general treaty providing that future disputes were to be settled by arbitration. Such waivers were acceptable and generally regarded as irrevocable.

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[294] Article 14 (b) reads:

Article 14

Local remedies do not need to be exhausted where:

...

(b) the respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement;

...

(A/CN.4/523).

190. Implied waivers presented greater difficulty, as could be seen in the *ELSI* case where the International Court of Justice had been "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".[295] Hence, there must be clear evidence of such an intention, and some jurists had suggested that there was a presumption, albeit not an irrebuttable one, against implying waiver. But when the intention to waive the local remedies rule was clear in the language of the agreement or in the circumstances of the case, it had to be implied.

191. He observed that it was difficult to lay down any general rule as to when such a waiver could be implied, but he referred to the four examples, cited in his third report, in which special considerations might apply, namely: the case of a general arbitration agreement dealing with future disputes - silence in such an agreement did not imply waiver; the question whether the filing of a declaration under the Optional Clause implied waiver - the practice of States suggested that that could not be the case (in accordance with the *Panevezys-Saldutiskis Railway* decision); the case of an ad hoc arbitration agreement entered into after the dispute and where the agreement was silent on the local remedies rule - silence could be interpreted as waiver because the ad hoc agreement had been entered into after the dispute had arisen; and the situation in which a contract between an alien and the host State impliedly waived the local remedy rule and the respondent State then refused to go to arbitration - if the State of nationality took up the claim in such circumstances, the implied waiver might also extend to international proceedings, although the authorities were divided on that point. It could thus be concluded that waiver could not be readily implied, but where there was clear evidence of an intention to waive on the part of a respondent State, it had to be so implied. For that reason, he suggested that reference to implied waiver should be retained in article 14 (b).

192. Similar considerations applied in the case of estoppel. If the respondent State conducted itself in such a way as to suggest that it had abandoned its right to claim the exhaustion of local remedies, it could be estopped from claiming that the local remedies rule applied at a later stage. The possibility of estoppel in such a case had been accepted by a Chamber of the International Court of Justice in the *ELSI* case and was also supported by human rights jurisprudence.

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[295] At p. 42, para. 50.

193. In addition, the Special Rapporteur noted that waiver of the local remedies rule created some jurisprudential difficulties and the procedural/substantive distinction came into play. If the exhaustion of local remedies rule was procedural in nature, there was no reason why it could not be waived. It was simply a procedure that had to be followed and the respondent State could therefore dispense with it. The international wrong was not affected and the dispute could be decided by an international tribunal. If, on the other hand, the exhaustion of local remedies was one of substance, it could not be waived by the respondent State, because the wrong would only be completed after a denial of justice had occurred in the exhaustion of local remedies or if it was established that there were no adequate or effective remedies in the respondent State. Admittedly, some substantivists took the view that that could be reconciled with the substantive position.

(ii) Summary of the debate

194. Support was expressed for the referral of article 14 (b) to the Drafting Committee in the form proposed by the Special Rapporteur.

195. It was noted that waiver played different roles in the field of diplomatic protection. Article 45 (a) of the articles on the Responsibility of States for internationally wrongful acts considered waiver by an injured State, whereas proposed article 14 (b) of the present draft referred to waiver by the respondent State. In practice, the respondent State's waiver usually related to the obligation to exhaust local remedies, but it could also concern other aspects of admissibility of claims, such as the nationality of claims. Therefore, it was proposed that a more general provision be formulated to provide for waiver in the field of diplomatic protection, either by the claimant State or by the respondent State, as well as for acquiescence or estoppel. In addition, it was maintained that if the Commission nevertheless considered that a specific - rather than a general - provision on waiver was necessary, it would be better to separate that provision from those relating to the effectiveness of local remedies or the presence of a significant link between the individual and the respondent State, as the latter dealt with the scope and content of the rule, whereas waivers mostly concerned the exercise of diplomatic protection in a specific case.

196. It was also observed that waivers should not be confused with agreements between the claimant State and the respondent State to the effect that exhaustion of local remedies was not required, for such agreements had the same function, but were instances of *lex specialis*, and should not be considered when codifying general international law.

197. The view was expressed that article 14 (b) could be further improved by a closer study of the issues of implied waiver and estoppel. As for implied waivers, concern was expressed that *even when unequivocal, they might give rise to confusion. It was observed that* waiver was a unilateral act which should be irrevocable and should not easily be assumed to have taken place. It was noted that there were few unambiguous cases of implied waiver. This was corroborated by the fact that one of the few treaties on general dispute settlement, the 1957 European Convention on the Peaceful Settlement of Disputes,[296] had an express provision indicating that local remedies must be exhausted. It was, instead, suggested that the provision indicate that the respondent State must expressly and unequivocally waive the requirement that local remedies should be exhausted.

198. Conversely, the view was expressed that the possibility of implicit waiver should not be rejected out of hand. Emphasis had to be placed on the criteria of intention and clarity of intention, taking into account all pertinent elements.

199. Doubts were expressed concerning the advisability of including a reference to the concept of estoppel. It was stated that it was a common law notion and was viewed with some suspicion by practitioners of civil law, and that estoppel was covered by the broader concept of implied waiver. It was further observed that the examples cited by the Special Rapporteur with regard to estoppel were, without exception, cases in which an award or a judgement had stated that, since the respondent State had been silent regarding the failure to exhaust local remedies, it could not invoke that failure at a later stage. As such, there was some overlap between article 14 (b) and (f).

200. Others, while accepting the principle set out in the paragraph, had reservations about its formulation. It was suggested that it be stated that the waiver must be clear and unambiguous, even if it was implicit. Serious doubts were also expressed regarding the reference to the "respondent State", which seemed to imply contentious proceedings, which did not appear in the articles referred to the Drafting Committee or in articles 12 and 13. It was considered preferable to refer to the terminology used in the articles on Responsibility of States for internationally wrongful acts.

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[296] United Nations, *Treaty Series*, vol. 320, p. 243.

(iii) Special Rapporteur's concluding remarks

201. The Special Rapporteur observed that, while strong support existed for the inclusion of express waiver as an exception to the exhaustion of local remedies rule, many speakers had been troubled by implied waivers and had expressed the view that a waiver should be clear and unambiguous. However, even those members had not denied that the Drafting Committee should consider the question. He therefore suggested that article 14 (b) should be referred to the Drafting Committee with a recommendation that the Committee should exercise caution regarding implied waiver and should consider treating estoppel as a form of implied waiver.

(c) Voluntary link and territorial connection (art. 14 (c) and (d))[297]

(i) Introduction by the Special Rapporteur

202. The Special Rapporteur, in introducing articles 14 (c) and (d), suggested that the Commission should consider the provisions together as they were closely linked. He noted that while there was support for those rules, it could also be adduced that the existing rule on the exclusion of local remedies might cover those two paragraphs. He also recalled that when the Commission had considered the matter in respect of article 22 of the draft on State responsibility on first reading,[298] it had been decided that it was unnecessary to include such provisions.

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[297] Article 14 (c) and (d) reads:

Article 14

Local remedies do not need to be exhausted where:

...

(c) there is no voluntary link between the injured individual and the respondent State;

(d) the internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State;

...

(A/CN.4/523).

[298] See note 287 above.

203. In his report, he had raised the question of whether the Commission needed one or more separate provisions dealing with the absence of a voluntary link or a territorial connection. The debate on the subject had largely grown out of the *Aerial Incident* case,[299] where there had been no voluntary link between the injured parties and Bulgaria. He noted that in all the traditional cases dealing with the exhaustion of local remedies rule, there had been some link between the injured individual and the respondent State, taking the form of physical presence, residence, ownership of property or a contractual relationship with the respondent State. Furthermore, diplomatic protection had undergone major changes in recent years. In the past, diplomatic protection had been concerned with cases in which a national had gone abroad and was expected to exhaust local remedies before proceeding to the international level. However, more recently, there was the problem of transboundary environmental harm, arising, for example, from the Chernobyl accident.

204. The Special Rapporteur observed further that those who supported the adoption of a voluntary link or territorial connection exception to the local remedies rule emphasized that, in the traditional cases, there had been an assumption of risk on the part of the alien in the sense that he had subjected himself to the jurisdiction of the respondent State and could therefore be expected to exhaust local remedies. However, there was no clear authority on the need to include a separate rule. The Special Rapporteur, in illustrating the point that the judicial decisions on this point were largely ambiguous, referred to several such decisions, including the *Interhandel* case,[300] the *Salem* case,[301] the *Norwegian Loans* case,[302] and the *Aerial Incident* case. Similarly, cases involving transboundary harm tended to suggest that it was not necessary to exhaust local remedies. For example, in the *Trail Smelter* case,[303] exhaustion of local remedies had not been insisted upon. But the decision in that case could also be explained by

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[299] 1959 *I.C.J. Reports*, p. 146.

[300] 1959 *I.C.J. Reports*, p. 6.

[301] 2 *U.N.R.I.A.A.*, p. 1165 (1932).

[302] 1957 *I.C.J. Reports*, p. 9.

[303] 3 *U.N.R.I.A.A.*, p. 1905 (1935).

saying that it was dealing with a direct injury by the respondent State (Canada) of the claimant State (the United States) and that there thus had been no need to exhaust local remedies in that situation. In his view, the proponents of the voluntary link/territorial connection requirement had made out a strong case.

205. It was noted further that supporters of the voluntary link requirement had never equated it with residence. If residence were the requirement, that would exclude the application of the exhaustion of local remedies in cases of the expropriation of foreign property and contractual transactions where the injured alien was not permanently resident in the respondent State. He observed further that, where a State had been responsible for accidentally shooting down a foreign aircraft, in many cases it had not insisted that local remedies must first be exhausted. The same applied to transboundary environmental harm; for example the Gut Dam Arbitral Agreement,[304] in which Canada had waived that requirement, and the 1972 Convention on International Liability for Damage caused by Space Objects,[305] neither of which required exhaustion of local remedies.

206. The Special Rapporteur remarked that early codification efforts had usually focused on State responsibility for damage done in the State's territory to the person or property of foreigners and on the traditional situation in which an alien had gone to another State to take up residence and do business. During the first reading of the draft articles on State responsibility, the Commission had refrained from including an exception to the local remedies rule on the existence of a voluntary link, because, as neither State practice nor judicial decisions had dealt with it, the Commission had felt that it was best to let it be addressed by existing rules and to allow State practice to develop.

207. In his view, there was good reason to give serious consideration to including the exceptional rules in articles 14 (c) and (d). It seemed impractical and unfair to insist that an alien be required to exhaust local remedies in the four situations: transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects; the shooting down of aircraft

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[304] Reproduced in (1965) 4 *I.L.M.*, p. 468.

[305] United Nations, *Treaty Series*, vol. 961, p. 188.

outside the territory of the respondent State or of aircraft that had accidentally entered its airspace; the killing of a national of State A by a soldier of State B stationed on the territory of State A; and the transboundary abduction of a foreign national from either his home State or a third State by agents of the respondent State.

208. It was for the Commission to examine whether such examples required a special rule exempting them from the scope of the local remedies rule or whether they were already covered by existing rules. In many such cases, the injury to the claimant State by the respondent State was direct. That was true, for example, of most cases of transboundary environmental harm, the accidental shooting down of aircraft and the transboundary abduction of a national. As such, he left it to the Commission to decide whether it wished to follow the course previously taken in the context of State responsibility and to allow the matter to develop in State practice, or whether it felt there was a need to intervene *de lege ferenda*.

(ii) Summary of the debate

209. Support was expressed for the view that, in the absence of a voluntary link between the individual and the respondent State or when the respondent State's conduct had taken place outside its territory, it might be unfair to impose on the individual the requirement that local remedies should be exhausted, and that it was justifiable to provide for such exceptions to the exhaustion of local remedies rule in the context of progressive development. It was further observed that the underlying principle seemed to be a matter of common sense and equity.

210. However, issue was taken with the tentative tone of the Special Rapporteur's report. It was maintained that, regardless of the paucity of clear authority for or against the voluntary link, it was open to the Commission to engage in the progressive development of international law if it so wished. It was thus suggested that the Commission could look more directly at questions of policy underlying the local remedies rule.

211. However, it was cautioned that the text of articles 14 (c) and (d) went too far in categorically stating that both the absence of a voluntary link and the fact that the respondent State's conduct had not been committed within its territorial jurisdiction were per se circumstances that totally excluded the requirement that local remedies should be exhausted. It was suggested that a single provision be formulated allowing for an exception to the exhaustion of local remedies rule in either of those two cases, where the circumstances justified it.

212. In terms of a further view, the issue was not one of an exception to the rule, but rather concerned the very rationale for the rule itself.

213. Others observed that the problem with the concept of voluntary link was that the "link" was a physical concept, a nineteenth century view of the physical movement of people. However, in an era of economic globalization individuals are increasingly able to influence entire economies extraterritorially. As such, the local remedies rule could also be viewed as protecting the respondent State, whose interests had to be taken into consideration.

214. It was noted that the exhaustion of local remedies did not involve the assumption of risk but was a way in which issues between Governments were resolved before they became international problems. Hence, to focus on certain aspects of the rule that tended to distort it into an assumption of risk on the part of the individual would be misleading. While there was room for the notion of "voluntary link" as part of the concept of reasonableness or other concepts espousing distinctions based, inter alia, on the activity of the individual and the extent to which the burden of exhaustion was onerous, it was in that subsidiary capacity that the notion should be examined rather than as a primary consideration. In some situations, for example, there might be a voluntary link in a technical sense, but for other reasons it might be unreasonable to require exhaustion of local remedies.

215. Caution was also expressed against confusing diplomatic protection with general international claims. While the concept was useful for explaining why local remedies should be exhausted, it would be wrong to conclude that when there was no voluntary link, diplomatic protection should not be invoked.

216. Doubts were also expressed as to the aptness of the examples cited in the Special Rapporteur's report in support of the voluntary link requirement. It was noted, for example, that in cases involving the shooting down of foreign aircraft, referred to in paragraph 79 of the report, generally speaking, the States responsible insisted that the act had been an accident, refusing to accept responsibility for a wrongful act, and offering ex gratia payments to compensate the victims. Disagreement was also expressed with the reference to the example of the 1972 International Convention on Liability for Damage caused by Space Objects, since it concerned a special regime.

217. As regards the Special Rapporteur's view that it was unreasonable to require an injured alien to exhaust domestic remedies in such difficult cases as transboundary environmental harm, while support was expressed for that view, others observed that the concept of transboundary damage had its own characteristics, which did not necessarily match those of diplomatic protection.

218. Concerning the example of the Chernobyl incident, it was pointed out that plaintiffs in the United Kingdom, for example, would have been required to exhaust local remedies in the courts of the Ukraine. Requiring groups of people that were not well-funded to exhaust local remedies in such circumstances was considered oppressive.

219. Others expressed doubts about the appropriateness of describing cases such as *Trail Smelter*, Chernobyl and other incidents of transboundary harm and environmental pollution as falling under the rubric of diplomatic protection. Such cases were typically dealt with as examples of direct injury to the State. To do otherwise might be to expand the scope of diplomatic protection too far. Furthermore, it was not clear that the Chernobyl accident had amounted to an internationally wrongful act. While it may have been an issue of international liability, it was not clearly one of international responsibility. It was also maintained that it would be artificial to consider that the measures taken in response by the United Kingdom and other countries as constituting an exercise of diplomatic protection.

220. Conversely, it was observed that the Chernobyl incident did raise issues of international responsibility arising out of the failure to respect the duty of prevention. It was also pointed out that all that was novel in that case was the number of victims; the risk of nuclear accidents had been envisaged in several major European multilateral conventions which had the very purpose of addressing the issue of civil liability in the event of such an accident.

221. Still others recalled that the Commission had included a provision on equal access in its draft articles on Prevention of transboundary harm (art. 15).[306] Such provisions, which were found in most environmental treaties, encouraged the individuals who were affected and lived in other countries to make use of the remedies available in the country of origin of the pollution.

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[306] *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chap. V.E.1.

However, the impact of article 14 (c) was to discourage people from doing that unless their connection to the country of origin was voluntary. It was thus cautioned that when the Commission did something in the field of general international law, it should keep in mind developments in more specific areas that might diverge from what it was doing.

222. The Commission considered various options as to the drafting of article 14 (c), including not treating the voluntary link requirement as an exception to the rule of exhaustion of local remedies, but locating it as a provision on its own, or considering it together with article 14 (a) or articles 10 and 11. Some members regarded the requirement of a voluntary link as a sine qua non for the exercise of diplomatic protection, instead of an exception. Still others preferred to view it as merely a factor to be taken into account.

223. As regards article 14 (d), some speakers professed confusion at the examination of the concept of "voluntary link" together with the concept of "territorial connection". The view was expressed that there was no merit in article 14 (d), because it seemed to be only a sub-concept of the concept dealt with in article 14 (c). It was thus proposed that article 14 (d) be deleted.

(iii) Special Rapporteur's concluding remarks

224. The Special Rapporteur remarked that the conclusions to be drawn from the debate were not clear. There had been general agreement that, whatever became of article 14 (c), article 14 (d) was one of its components and did not warrant separate treatment. Many members had expressed the view that, while article 14 (c) embodied an important principle, it was not so much an exception as a precondition for the exercise of diplomatic protection. Others had maintained that those issues could be dealt with in the context of reasonableness under article 14 (a). Several members had argued that cases of transboundary harm involved liability in the absence of a wrongful act and should be excluded completely. His preliminary view was that it was unnecessary to include article 14 (c) and (d) because, in most cases, they would be covered by article 11 on direct injury or article 14 (a) on effectiveness.

225. At the request of the Commission, the Special Rapporteur subsequently circulated an informal discussion paper summarizing his recommendation for action to be taken on article 14 (c). He was persuaded that the voluntary link was essentially a rationale for the exhaustion of local remedies rule and that, as such, it was not suitable for codification. In his view, if the Commission nonetheless wanted to codify the voluntary link, there were a number of

ways of doing so, such as amending article 10 to read: "A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, who has a voluntary link with the responsible State, before the injured national has exhausted all available local legal remedies." Alternatively, the voluntary link could be retained as an exception, along the lines suggested in draft article 14 (c). If there were objections to the term "voluntary link", article 14 (c) could be replaced by "(c) Any requirement to exhaust local remedies would cause great hardship to the injured alien [/be grossly unreasonable]". In terms of a further suggestion, article 14 (c) would be simply deleted as being undesirable, particularly in the light of developments in the law relating to transboundary harm.

226. His preference was not to provide expressly for a voluntary link, but to include it in the commentary to article 10 as a traditional rationale for the exhaustion of local remedies rule, in the commentary to article 11 with a discussion of direct injury to a State where local remedies need not be exhausted and in the commentary to article 14 (a) in the discussion of whether local remedies offered a reasonable possibility of an effective remedy.

227. Referring to the hardship cases which had been discussed in paragraph 83 of his third report, and in which it was unreasonable to require an injured alien to exhaust local remedies, he pointed out that, in the first case, namely, transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects, if the injury resulted from an act which was not an internationally wrongful act, the context was not that of State responsibility, which includes diplomatic protection, but that of liability. If the injury resulted from an internationally wrongful act it was a direct injury. He was therefore of the opinion that there was no need for a separate provision requiring a voluntary link as a precondition for the application of the local remedies rule. In the second type of situation, i.e. the shooting down of an aircraft outside the territory of the responsible State or an aircraft that had accidentally entered its airspace, there really was a direct injury and State practice showed that, in most cases, the responsible State would not insist on the need for the exhaustion of local remedies. As regards the third type of situation, involving the killing of a national of State A by a soldier from State B stationed in the territory of State A, in most circumstances, there would be an international treaty provision for the possibility of a claim against State B. If there was no such agreement, however, there was no reason why the individual's heirs should not be required to request compensation in the courts of

State B, provided that there was a reasonable prospect of an effective remedy. That situation was already covered by draft article 14 (a) and there was no need for a separate provision. With regard to the transboundary abduction of a foreign national from either the home State or a third State by agents of the responsible State, there were two possible options: either there had clearly been a violation of the territorial sovereignty of the State of nationality of the foreigner, which could give rise to a direct claim by the State against the responsible State, or the injured party might have the possibility to sue in the domestic courts of the responsible State and there was no reason why that remedy could not be resorted to. If that possibility was not available, the situation was that covered by draft article 14 (a).

228. In his opinion, the Commission should not hamper the development of international law on the question, particularly as the practice of States continued to evolve, especially in the field of damage to the environment. He suggested that the Commission should say nothing about the voluntary link in the draft articles, but should simply refer to it in the commentary on several occasions and deal with it in the context of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

(d) Undue delay and denial of access (art. 14 (e) and (f))[307]

(i) Introduction by the Special Rapporteur

229. The Special Rapporteur observed that article 14 (e), on undue delay, was supported in various codification efforts, human rights instruments and judicial decisions, such as the *El Oro Mining and Railway Co.*[308] and the *Interhandel* cases. Nevertheless, such exception to the

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[307] Article 14 (e) and (f) read:

Article 14

Local remedies do not need to be exhausted where:

...

(e) the respondent State is responsible for undue delay in providing a local remedy;

(f) the respondent State prevents the injured individual from gaining access to its institutions which provide local remedies.

(A/CN.4/523).

[308] British-Mexican Claims Commission, 5 *U.N.R.I.A.A.*, p. 191 (1931).

exhaustion of local remedies rule was more difficult to apply in complicated cases, particularly those involving corporate entities. While it could be subsumed under the exception set out in article 14 (a), it deserved to be retained as a separate provision as a way of serving notice on the respondent State that it must not unduly delay access to its courts.

230. He remarked further that article 14 (f), dealing with prevention of access, was relevant in contemporary circumstances. It was not unusual for a respondent State to refuse an injured alien access to its courts on the grounds that the alien's safety could not be guaranteed or by not granting an entry visa.

(ii) Summary of the debate

231. Satisfaction was expressed with both article 14 (e) (undue delay) and 14 (f) (denial of access). Others maintained that the two provisions did not constitute specific categories, inasmuch as a proper reading of article 14 (a), whether drafted in the form of option 1 or of option 3, would encompass both exceptions. It was thus suggested that the two provisions could be recast in light of the amendment to article 14 (a). It was also proposed that article 14 (e) be combined with article 14 (a), or at least be moved closer to that provision.

232. In terms of another view, article 14 (e) was not rendered superfluous in the light of article 14 (a). The cases covered by articles 14 (a) and (e) were in a sense consecutive in time: an existing local remedy which might at first appear to be a "reasonable possibility" from the standpoint of article 14 (a) might subsequently not need to be further pursued, in the light of undue delay in its application. The view was also expressed that the text should refer not to "delay in providing a local remedy", but to the court's delay in taking a decision with regard to a remedy which had been used.

233. While it was agreed that a decision had to be obtainable "without undue delay", it was suggested that the text specify what was abusive. It was also noted that what constituted undue delay would be a matter of fact to be judged in each case. It was proposed that the provision be reformulated to read "Local remedies do not need to be exhausted where the law of the State responsible for the internationally wrongful act offers the injured person no objective possibility of obtaining reparation within a reasonable period of time". It would then be explained that "The objective possibility of obtaining reparation within a reasonable period of time must be assessed in good faith [in the light of normal practice] or [in conformity with general principles of law]".

234. Conversely, doubts were expressed about the validity of the exception set out in article 14 (e), since undue delay might simply be the result of an overburdened justice system, as was often the case in countries faced with serious shortages of resources, and, in particular, of qualified judges to deal with cases. Others disagreed and pointed out that a State should not benefit from the fact that a national judiciary had allowed a case to be unnecessarily delayed.

235. As regards article 14 (f), it was observed that, if access to a remedy was prevented, it would be concluded that there was no remedy at all. As such the proposed wording did not correspond to what was intended. Instead, the Special Rapporteur's proposal referred to a different situation, one in which an alien was refused entry to the territory of the allegedly responsible State or where there was a risk to the alien's safety if he entered the territory. Those elements would rarely be decisive in the context of civil remedies. Normally, the claimant's physical presence in the territory of the State in which he or she wished to claim a civil remedy was not required. It was noted that, in most legal systems, it was entirely possible to exhaust local remedies through a lawyer or a representative.

236. It was proposed that the exception be limited to cases in which physical presence appeared to be a condition for the success of the remedy. It was also suggested that there should be some reference, even if in the commentaries, to the problem posed where the individual or lawyer was dissuaded, by means of intimidation, from taking up the case. Likewise, it was queried why the provision was limited to cases where it was the respondent State that denied the injured individual access to local remedies. Other non-State actors might similarly constitute obstacles to such access.

237. Others expressed doubts and were of the view that the provision might be regarded as covered by article 14 (a). If the respondent State effectively prevented the injured alien from gaining access to the courts, then in practice there was no reasonable possibility of an effective remedy. It was thus proposed that it could be included in the commentary as part of the more general test of effectiveness as stated in paragraph (a).

(iii) Special Rapporteur's concluding remarks

238. The Special Rapporteur noted that opinions differed on article 14 (e) on undue delay. While some members had opposed it, others had suggested that it might be dealt with under article 14 (a). The majority had preferred to deal with it as a separate provision. He therefore proposed that it should be referred to the Drafting Committee, bearing in mind the suggestion that it should be made clear that the delay was caused by the courts.

239. As regards article 14 (f), the Special Rapporteur pointed to the division between common and civil law systems. In the common law system, the injured individual might have to give evidence in person before the court, and if he or she was not permitted to visit the respondent State, then no claim could be brought. He observed that there had been some support for referring article 14 (f) to the Drafting Committee. However, the majority of members had taken the view that it would be better to deal with that issue under article 14 (a). He therefore recommended that article 14 (f) should not be sent to the Drafting Committee.

4. Article 15[309]

(a) Introduction by the Special Rapporteur

240. The Special Rapporteur observed that the burden of proof in the context of international litigation related to what must be proved and which party must prove it. It was a difficult subject to codify, first because there were no detailed rules in international law of the kind found in most municipal law systems, and second, because circumstances varied from case to case and general rules that applied in all instances were difficult to lay down. Nevertheless, in his view, the subject was important to the exhaustion of local remedies rule and therefore warranted inclusion in the draft.

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[309] Article 15 reads:

Article 15

> 1. The claimant and respondent State share the burden of proof in matters relating to the exhaustion of local remedies in accordance with the principle that the party that makes an assertion must prove it.
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> 2. In the absence of special circumstances, and without prejudice to the sequence in which a claim is to be proved:
>
> (a) the burden of proof is on the respondent State to prove that the international claim is one to which the exhaustion of local remedies rule applies and that the available local remedies have not been exhausted;
>
> (b) the burden of proof is on the claimant State to prove any of the exceptions referred to in Article 14 or to prove that the claim concerns direct injury to the State itself.

(A/CN.4/523).

241. He observed further that, as a general principle, the burden of proof lay on the party that made an assertion. Article 15, paragraph 1, reflected that principle. However, in his view, the general principle was not enough and therefore, he suggested two additional principles which were incorporated in paragraph 2. They related to the burden of proof in respect of the availability and effectiveness of local remedies. He recalled that previous attempts to codify the local remedies rule had avoided elaborating provisions on those subjects.

242. It was observed that the subject had been considered at some length by human rights treaty monitoring bodies, and that their jurisprudence supported two propositions, namely, that the respondent State must prove that there was an available remedy that had not been exhausted by the claimant State, and that if there were available remedies, the claimant State must prove that they were ineffective or that some other exception to the local remedies rule was applicable. However, he conceded that such jurisprudence was guided strongly by the instruments that established the treaty monitoring bodies, and that it was questionable whether the principles expounded by those bodies were directly relevant to general principles of diplomatic protection.

243. As to judicial and arbitral decisions, the Special Rapporteur remarked that some support for the principles he had outlined could be found in the *Panevezys-Saldutiskis Railway* case, the *Finnish Ships Arbitration*,[310] the *Ambatielos* claim,[311] the *ELSI* case, the *Aerial Incident* case[312] and the *Norwegian Loans* case. Two conclusions could be drawn from those cases: first, the burden of proof was on the respondent State in that it had to show the availability of local remedies, and second, the claimant State bore the burden of proof for showing that if remedies were available, they were ineffective or that some other exception applied, for instance, that there had been a direct injury to the claimant State.

244. At the same time, he conceded that it was difficult to lay down general rules, since the outcome was linked to the facts of each case. He recalled the *Norwegian Loans* case, which involved a specific fact pattern and in which context Judge Lauterpacht laid down four principles

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[310] *Finnish Vessels Arbitration*, 3 *U.N.R.I.A.A.* 1479 (1934).

[311] 12 *U.N.R.I.A.A.* 120 (1956).

[312] (Preliminary Objections) 1959 *I.C.J. Reports*, 127.

which enjoyed considerable support in the literature: it was for the plaintiff State to prove that there were no effective remedies to which recourse could be had; no such proof was required if there was legislation which on the face of it deprived the private claimants of a remedy; in such a case, it was for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence could reasonably be assumed; and the degree of burden of proof ought not to be unduly stringent.

245. The Special Rapporteur confirmed that, in his view, the four principles adduced by Lauterpacht resulted from the unusual circumstances of the *Norwegian Loans* case. As such, they did not undermine his own hypothesis that there were essentially two rules on the availability and effectiveness of local remedies, as set out in article 15, paragraph 2 (a) and (b).

(b) Summary of the debate

246. While some support for article 15 was expressed, strong opposition was voiced in the Commission to the inclusion of article 15 on the burden of proof. It was doubted that rules of evidence should be included within the scope of the topic. Furthermore, customary rules of evidence, if they did exist, were difficult to establish. Reference was made to the differences between common law and civil law systems regarding issues relating to the burden of proof. Similarly, it was noted that rules of evidence also varied greatly, depending on the type of international proceedings. It was further observed that, in view of the traditional requirements regarding the burden of proof, it seemed unlikely that any judicial or other body would feel constrained by what was an extremely complex additional provision.

247. It was observed that the respondent State was in a much better position than judges or the claimant to demonstrate the existence of remedies. Similarly, the State of nationality was best able to provide evidence on the nationality of the individual. There, the burden of proof was on the claimant State. Thus, the position of the State as a claimant or respondent seemed to be less important than the availability of evidence.

248. Furthermore, doubts were expressed as to the relevance of the human rights jurisprudence - developed on the basis of specific treaty provisions within the framework of a procedural system - to the task of delineating the burden of proof in general international law.

Moreover, the same treaty body might have different rules of evidence at each stage of the proceedings. The example of the European Court of Human Rights was cited in that regard. While the rule proposed by the Special Rapporteur was appealing in its simplicity, the situation was bound to be much more complex in practice. It was also noted that it would be difficult to reach an agreement on the subject matter of article 15.

249. It was suggested that the burden of proof could best be left to the rules of procedure or *compromis* in the case of international judicial forums, and to the law of the State in cases of resort to domestic forums of adjudication. It was also proposed that the commentary could include a discussion of the question of the burden of proof.

250. Concerning paragraph 1, the view was expressed that it provided little guidance to state as a general principle, that the party that made an assertion must prove it. What mattered was not the allegation, but the interest which the party might have in establishing a certain fact that appeared to be relevant. Conversely, the view was expressed that paragraph 1 was useful and should be included.

251. As regards, paragraph 2, the view was expressed that the distinction between the availability of a remedy, which should be shown by the respondent State, and its lack of effectiveness, which should be demonstrated by the claimant State, was artificial. A remedy that offered no chance of success, i.e. was not effective, was not one which needed to be exhausted. Thus, the respondent State's interest went further than establishing that a remedy existed: it had to also show that it had a reasonable chance of success. At issue, was the effectiveness of a remedy in the absence of pertinent judicial precedents at the time of the injury. In terms of a further view, the problem was simply one of drafting, which the Drafting Committee could look into.

(c) Special Rapporteur's concluding remarks

252. The Special Rapporteur observed that, while article 15 had been considered innocuous by some and too complex by others, a large majority had been opposed to its inclusion. He could therefore not recommend that it should be referred to the Drafting Committee.

5. Article 16[313]

(a) Introduction by the Special Rapporteur

253. The Special Rapporteur, in introducing article 16 said that the Calvo clause was an integral part of the history and development of the exhaustion of local remedies rule and continued to be of relevance. He explained that the Calvo clause was a contractual undertaking whereby a person voluntarily linked with a State of which he was not a national agreed to waive the right to claim diplomatic protection by his State of nationality and to confine himself exclusively to local remedies relating to the performance of the contract.

254. From the outset, the Calvo clause had been controversial. Latin American States had seen it as a rule of general international law, and as a regional rule of international law, and many of them, notably Mexico, had incorporated it into their constitutions. On the other hand,

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[313] Article 16 reads:

Article 16

1. A contractual stipulation between an alien and the State in which he carries on business to the effect that:

(a) the alien will be satisfied with local remedies; or

(b) no dispute arising out of the contract will be settled by means of an international claim; or

(c) the alien will be treated as a national of the contracting State for the purposes of the contract, shall be construed under international law as a valid waiver of the right of the alien to request diplomatic protection in respect of matters pertaining to the contract,

such a contractual stipulation shall not, however, affect, the right of the State of nationality of the alien to exercise diplomatic protection on behalf of such a person when he or she is injured by an internationally wrongful act attributable to the contracting State or when the injury to the alien is of direct concern to the State of nationality of the alien.

2. A contractual stipulation referred to in paragraph 1 shall be construed as a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement.

(A/CN.4/523/Add.1).

other States had seen it as contrary to international law, on the ground that it offended the Vattelian fiction, according to which an injury to a national was an injury to the State, and that only the State could waive the right to diplomatic protection.

255. The leading case on the subject was the decision handed down by the United States-Mexican Claims Commission in the *North American Dredging Company* case of 1926,[314] in which it had been shown that the Calvo clause was compatible with international law in general and with the right to diplomatic protection in particular, although the decision in that case had been subjected to serious criticism by jurists.

256. However, there was still debate on its purpose and scope, and he alluded to several considerations that had emerged from that debate. First, the Calvo clause was of limited validity in the sense that it did not constitute a complete bar to diplomatic intervention. It applied only to disputes relating to the contract between alien and host State containing the clause, and not to breaches of international law. Secondly, the Calvo clause confirmed the importance of the exhaustion of local remedies rule. Some writers had suggested that the clause was nothing more than a reaffirmation of that rule, but most writers saw it as going beyond such a reaffirmation. Thirdly, international law placed no bar on the right of an alien to waive by contract his own power or right to request his State of nationality to exercise diplomatic protection on his behalf. Fourthly, an alien could not by means of a Calvo clause waive rights that under international law belonged to his Government. Fifthly, the waiver in a Calvo clause extended only to disputes arising out of the contract, or to breach of the contract, which did not, in any event, constitute a breach of international law; nor, in particular, did it extend to a denial of justice.

257. He observed further that the Calvo clause had been born out of the fear on the part of Latin American States of intervention in their domestic affairs under the guise of diplomatic protection. Capital exporting States, for their part, had feared that their nationals would not receive fair treatment in countries whose judicial standards they regarded as inadequate. Since then, the situation had changed. The Calvo clause nevertheless remained an important feature of the Latin American approach to international law and the doctrine influenced the attitude of developing countries in Africa and Asia, which feared intervention by powerful States in their domestic affairs.

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[314] *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, 4 *U.N.R.I.A.A.* 26 (1926).

258. Furthermore, the Calvo doctrine, already reflected in General Assembly resolution 1803 (XVII) of 14 December 1962, on permanent sovereignty over natural resources, appeared again in the Charter of Economic Rights and Duties of States, contained in General Assembly resolution 3281 (XXIX) of 12 December 1974, which proclaimed that disputes over compensation arising from the expropriation of foreign property had to be settled under the domestic law of the nationalizing State. The influence of the Calvo doctrine was also to be seen in decision 24 of the Andean Pact. On the other hand, the North American Free Trade Agreement (NAFTA), which permitted foreign investors to resort to international arbitration without first exhausting local remedies, was seen by some as representing a departure from the Calvo doctrine.

259. Two options were open to the Commission: either to decline to draft any provision on the subject on the ground that to do so would be superfluous if one took the view that the Calvo clause simply reaffirmed the exhaustion of local remedies rule; or to draft a provision limiting the validity of the Calvo clause to disputes arising out of the contract containing the clause, without precluding the right of the State of nationality of the alien to exercise its diplomatic protection on behalf of that individual where he or she had been injured as a result of an internationally wrongful act attributable to the contracting State. Paragraph 2 provided that such a clause constituted a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement, where there was a *compromis* providing for an exception to the exhaustion of local remedies rule.

(b) Summary of the debate

260. The Special Rapporteur was commended for his thorough review of the history of the Calvo doctrine and his treatment of the issues raised in international law by the Calvo clause. Different views were expressed regarding the inclusion of a provision on the Calvo clause in the draft articles.

261. The view was expressed by some that, subject to a few drafting improvements, article 16 should be retained as a complement to article 10. As a codified rule, it would clarify the limits of contractual relationships between a State and an alien, particularly by guaranteeing the rights of the State of nationality under international law. Some members also expressed the view that the proposed article did not deal with the Calvo clause in its classical sense, but with a mere obligation of exhaustion of local remedies in particular circumstances. It was suggested that the

provision placed useful emphasis on the exhaustion of local remedies rule. Indeed, the view was expressed that the codification of the exhaustion of local remedies rule would be incomplete without a recognition of the Calvo clause.

262. The view was also expressed that the Calvo clause's value was not merely historical and symbolic, but that it remained an important issue in the modern world with international implications far exceeding those of contractual stipulations under domestic law. Moreover, though resort to the Calvo clause had been largely confined to Latin America, the problems it had sought to address had a global, not merely a regional, dimension. As such, by including the provision, the Commission would be codifying a regional customary rule, which could legitimately be elevated to the rank of a universal rule.

263. The view was further expressed that the Calvo clause was not contrary to international law, on account of two important principles, namely, the sovereign equality of States, which entailed a duty of non-intervention, and the equal treatment of nationals and aliens. It was also noted that article 16 did not set out to codify the Calvo clause as such, but instead laid down limits to its application in international relations. It also clarified the relationship between the rights of the individual and of the State in that area, which was that a foreign individual or company had the right to seek, and a State the right to exercise, diplomatic protection.

264. Others spoke against the inclusion of the provision in the draft articles on diplomatic protection, and preferred its deletion. The view was expressed that article 16 was beyond the scope of the Commission's Statute, in particular article 15 thereof: it was not a rule of law and therefore did not lend itself to codification. The Calvo clause was said to be a mere contractual drafting device.

265. It was pointed out that the national of the State could not replace the State, since it was not his own rights that were involved, but those of the State. An alien could not waive a right that was not his. As such, the legal significance of the waiver in paragraph 1 was uncertain since the alien's request was not a precondition for the exercise of diplomatic protection. The alien could, however, undertake, first, to rely only on the laws of the host country and, secondly, not to seek the diplomatic protection of his State of origin. What could not be done was to guarantee that the State of nationality would not intervene to ensure respect for its right to see international law respected in the person of its national. Hence, the question was not whether the Calvo clause was valid or not under international law. It was neither prohibited under international law nor

regarded as lawful. There would be a breach of contract, but no breach of an obligation under international law, either by the alien or by the State of nationality, if the alien requested diplomatic protection from that State.

266. It was also noted by some that while the Calvo clause was of historical importance, in practice, it was used less and less. Furthermore, the international context differed from that in which the Calvo clause had been formulated a century before. The concerns underlying the Calvo doctrine had to a large extent been addressed by developments in the latter half of the twentieth century, including the adoption of several important international texts referred to in the Special Rapporteur's report. Likewise, the conduct of States in the modern-day world was strongly influenced, if not conditioned, by common standards imposed by international human rights law. Furthermore, the importance that Governments attached, and the recognition they accorded, to private entrepreneurship made it possible for foreign private investments to enjoy a secure legal environment. For example, it was more common for States to conclude investment agreements making provision for direct recourse to international arbitration in the event of a dispute.

267. Disagreement was further expressed with the inclusion of paragraph 2. It was thought to contradict the exhaustion of local remedies rule. The existence of a Calvo clause was not necessary to create a presumption in favour of the exhaustion of local remedies. That presumption existed independently of any contractual clause.

268. The Commission further considered a suggestion that a general provision be drafted concerning waivers, both on the part of the State of nationality and on that of the host State. However, the proposal was opposed on the grounds that it had not been fully discussed in plenary.

(c) Special Rapporteur's concluding remarks

269. The Special Rapporteur noted that opinions in the Commission were fairly evenly divided on whether to include article 16. It seemed to him that those who thought the Calvo clause was not within the Commission's remit were nonetheless convinced of its importance in the history and development of diplomatic protection. Hence, the inclusion of article 16, which reflected the Calvo clause, could be acceptable. He had been impressed by arguments from both sides of the debate, and noted the fact that representatives from all regional groups could be found on both sides.

270. He observed that there had been very little support for article 16, paragraph 2, except in that its contents should be dealt with in the commentary to article 14 (b).

271. The question facing the Commission was, thus, whether to refer article 16, paragraph 1, to the Drafting Committee, with the important amendments suggested during the debate, or to omit it from the draft. If it was omitted, the subject would have to be dealt with extensively in the commentary, specifically to article 10 and article 14 (b).

272. The Special Rapporteur further pointed out that it would not be appropriate to take up the suggested drafting of an omnibus waiver clause before a full consideration of such a provision was undertaken by the Plenary.

273. Given the almost even division in the Commission, he found it difficult to make a recommendation on how to proceed. However, on balance, he recommended that the Commission refer article 16, paragraph 1, to the Drafting Committee, subject to the drafting suggestions made during the debate. The Commission subsequently decided not to refer article 16 to the Drafting Committee.

6. Denial of justice

(a) Introduction by the Special Rapporteur

274. The Special Rapporteur observed that the concept of "denial of justice", which was inextricably linked with many features of the local remedies rule, including that of ineffectiveness, could as such be said to have a secondary character. He proposed to consider the place of denial of justice within the draft articles in an addendum to his third report, and invited observations on the subject from the Commission.

(b) Summary of the debate

275. The view was expressed that the concept of "denial of justice" was merely one of the manifestations of the more general rule whereby local remedies must be regarded as exhausted if they had failed or were doomed to failure. As the concept was covered by article 14 (a), (e) and (f), it was not necessary to devote a specific provision to it and the point could be stressed in the commentary. It was also cautioned that taking up the subject of denial of justice could be very difficult and that, strictly speaking, it fell outside the scope of diplomatic protection.

276. Others maintained that it would be difficult to disregard the question of denial of justice, which could be one of the situations giving rise to the exercise of diplomatic protection, and that it would be appropriate to include some consideration of denial of justice in the study.

(c) Special Rapporteur's concluding remarks

277. The Special Rapporteur noted that the debate had revealed that the majority of the members were hostile or, at best, neutral regarding the inclusion of the question of denial of justice in the study. Several members had stressed that it was a primary rule, while others pointed out that denial of justice did arise in a number of procedural contexts and was thus a form of secondary rule.

278. He observed that the content of the notion of denial of justice was uncertain. At the beginning of the twentieth century, it had involved a refusal of access to the courts; Latin American scholars had included judicial bias and delay of justice, while others took the view that denial of justice was not limited to judicial action or inaction, but included violations of international law by the executive and the legislature. The contemporary view was that denial of justice was limited to acts of the judiciary or judicial procedure in the form of inadequate procedure or unjust decisions. However, it featured less and less in the jurisprudence and had been replaced to a large extent by the standards of justice set forth in international human rights instruments, particularly article 14 of the International Covenant on Civil and Political Rights.[315]

279. Since the prevailing view in the Commission was that the concept did not belong to the study, he no longer intended to produce an addendum on it.

C. Text of draft articles 1 to 7 of the draft articles on diplomatic protection provisionally adopted by the Commission

1. Text of the draft articles

280. The texts of draft articles 1 to 7 adopted by the Commission at its fifty-fourth session are reproduced below.

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[315] United Nations, *Treaty Series*, vol. 999, p. 171.

DIPLOMATIC PROTECTION

PART ONE

GENERAL PROVISIONS

Article 1

Definition and scope

1. Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7 [8].[316]

Article 2 [3][317]

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with these articles.

PART TWO

NATURAL PERSONS

Article 3 [5][318]

State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

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[316] This paragraph will be reconsidered if other exceptions are included in the draft articles.

[317] The numbers in square brackets are the numbers of the articles as proposed by the Special Rapporteur.

[318] Article 3 will be reviewed in connection with the Commission's consideration of the diplomatic protection of legal persons.

Article 4 [9]

Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

Article 5 [7]

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 6

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Article 7 [8]

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

2. Text of the draft articles with commentaries thereto

281. The texts of draft articles 1 to 7 with commentaries thereto adopted by the Commission at its fifty-fourth session, are reproduced below.

DIPLOMATIC PROTECTION

PART ONE

GENERAL PROVISIONS

Article 1

Definition and Scope

1. Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7 [8].[319]

Commentary

(1) Article 1 defines diplomatic protection by describing its main elements and at the same time indicates the scope of this mechanism for the protection of nationals injured abroad.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the

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[319] This paragraph will be reconsidered if other exceptions are included in the draft articles.

conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts,[320] maintain the distinction between primary and secondary rules and deal only with the latter.

(3) Paragraph 1 makes it clear that the right of diplomatic protection belongs to the State. In exercising diplomatic protection the State adopts in its own right the cause of its national arising from the internationally wrongful act of another State. This formulation follows the language of the International Court of Justice in the *Interhandel* case when it stated that the Applicant State had "adopted the cause of its national"[321] whose rights had been violated. The legal interest of the State in exercising diplomatic protection derives from the injury to a national resulting from the wrongful act of another State.

(4) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in article 3. The term "national" in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and where necessary, the two concepts are treated separately.

(5) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between "diplomatic action" and "judicial proceedings" when describing the action that may be taken by a State when it resorts to diplomatic protection.[322] Article 1 retains this distinction but goes further by subsuming judicial proceedings under "other means of peaceful settlement". "Diplomatic action" covers all the lawful procedures employed by States to inform each other of their views and concerns, including protest, request for an enquiry and negotiations aimed at the settlement of disputes. "Other means of peaceful

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[320] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 59-60.

[321] 1956 *I.C.J. Reports*, p. 6 at p. 27.

[322] *Panevezys-Saldutiskis Railway* case, *P.C.I.J. Reports Series A/B, No. 76*, p. 16; *Nottebohm* case 1955, *I.C.J. Reports*, p. 24.

settlement" embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection.

(6) Paragraph 1 makes it clear that the present articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded by an international organization to its officials, recognized by the International Court of Justice in its advisory opinion on *Reparation for Injuries*.[323] Functional protection[324] differs substantially from diplomatic protection in that it is premised on the function of the organization and the status of its agent.[325]

(7) Diplomatic protection covers the protection of nationals not engaged in official international business on behalf of the State. Diplomats and consuls are protected by other rules of international law and instruments, notably the Vienna Convention on Diplomatic Relations of 1961[326] and the Vienna Convention on Consular Relations of 1963.[327]

(8) Paragraph 2 recognizes that there may be circumstances in which diplomatic protection may be exercised in respect of non-nationals. Article 7 provides for such protection in the case of stateless persons and refugees. The footnote to paragraph 2 indicates that the Commission may include other exceptions at a later stage in its work.

Article 2 [3]

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with these articles.

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[323] 1949, *I.C.J. Reports*, p. 174.

[324] Ibid., p. 185.

[325] Ibid., pp. 180, 186.

[326] United Nations, *Treaty Series*, vol. 500, p. 95.

[327] United Nations, *Treaty Series*, vol. 596, p. 261.

Commentary

(1) Article 2 stresses that the right of diplomatic protection belongs to or vests in the State. It gives recognition to the Vattelian notion that an injury to a national is an indirect injury to the State.[328] This view was formulated more carefully by the Permanent Court of International Justice in the *Mavrommatis Palestine Concession* when it stated:

> "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right - its right to ensure, in the person of its subjects, respect for the rules of international law."[329]

This view is frequently criticized as a fiction difficult to reconcile with the realities of diplomatic protection, which require continuous nationality for the assertion of a diplomatic claim,[330] the exhaustion of local remedies by the injured national, and the assessment of damages suffered to accord with the loss suffered by the individual. Nevertheless the "Mavrommatis principle" or the "Vattelian fiction", as the notion that an injury to a national is an injury to the State has come to be known, remains the cornerstone of diplomatic protection.[331]

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national,[332] but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the *Barcelona Traction* case:

> " ... within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting

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[328] In *The Law of Nations* (1758) Emmerich de Vattel stated: "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen" (chap. VI, p. 136).

[329] 1924 *P.C.I.J. Series A, No. 2*, p. 12.

[330] See Article 4.

[331] For a discussion of this notion, and the criticisms directed at it, see the First Report of the *Special Rapporteur* on Diplomatic Protection, A/CN.4/506, paras. 61-74.

[332] For an examination of domestic laws on this subject, see ibid., paras. 80-87.

> consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress … The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case."[333]

A proposal that a limited duty of protection be imposed on the State of nationality was rejected by the Commission as going beyond the permissible limits of progressive development of the law.[334]

(3) The right of a State to exercise diplomatic protection may only be carried out within the parameters of the present articles.

PART TWO

NATURAL PERSONS

Article 3 [5][335]

State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. For the purpose of diplomatic protection of natural persons, a State of nationality means a State whose nationality the person sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

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[333] 1970, *I.C.J. Reports*, p. 44.

[334] See article 4 in the First Report of the Special Rapporteur on Diplomatic Protection, A/CN.4/506. For the debate in the Commission, see *Official Records of the General Assembly, Supplement No. 10* (A/55/10), paras. 447-456.

[335] Article 3 will be reviewed in connection with the Commission's consideration of the diplomatic protection of legal persons.

Commentary

(1) Whereas article 2 affirms the discretionary right of the State to exercise diplomatic protection, article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person. The emphasis in this article is on the bond of nationality between State and individual which entitles the State to exercise diplomatic protection. Paragraph 1 affirms this.

(2) Paragraph 2 defines the State of nationality for the purpose of diplomatic protection. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; secondly, that there are limits imposed by international law on the grant of nationality. Paragraph 2 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(3) The principle that it is for each State to decide who are its nationals is backed by both judicial decision and treaty. In 1923, the Permanent Court of International Justice stated in the *Nationality Decrees in Tunis and Morocco* case that:

> "in the present state of international law, questions of nationality are … in principle within the reserved domain".[336]

This principle was confirmed by article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

> "It is for each State to determine under its own law who are its nationals".[337]

More recently it has been endorsed by the 1997 European Convention on Nationality.[338]

(4) The connecting factors for the conferment of nationality listed in paragraph 2 are illustrative and not exhaustive. Nevertheless they include the connecting factors most commonly employed by States for the grant of nationality: birth (*jus soli*), descent (*jus sanguinis*) and naturalization. Marriage to a national is not included in this list as in most circumstances marriage per se is insufficient for the grant of nationality: it requires in addition a short period of

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[336] *P.C.I.J. Reports, Series B, No. 4*, p. 24.

[337] 179 L.N.T.S., p. 89.

[338] E.T.S. No. 166, Article 3.

residence, following which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse problems may arise in respect of the consistency of such an acquisition of nationality with international law.[339] Nationality may also be acquired as a result of the succession of States in accordance with the principles contained in the Commission's Draft Articles on Nationality of Natural Persons in Relation to the Succession of States.[340]

(5) The connecting factors listed in paragraph 2 are those most frequently used by developed States to establish nationality. In some developing countries, where there are no clear birth records, it will be difficult to prove nationality. In such cases residence could provide proof of nationality although it may not constitute a basis for nationality itself. A State may, however, confer nationality on such persons by means of naturalization.

(6) Paragraph 2 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case,[341] as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State)

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[339] See, e.g., article 9 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 1249, p. 13, prohibits the acquisition of nationality in such circumstances. See paragraph (7) below.

[340] See *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 47.

[341] In this case the International Court of Justice stated: "According to the practice of states, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection which has made him its national". (1955 *I.C.J. Reports*, p. 23).

were "extremely tenuous"[342] compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala".[343] This suggests that the Court did not intend to expound a general rule[344] applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, the Commission was mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.[345]

(7) The final phrase in paragraph 2 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who are its nationals, this right is not absolute. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws confirmed this by qualifying the provision that "it is for each State to determine under its own law who are its nationals" with the proviso "[t]his law shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality".[346] Today, conventions, particularly in the field of human

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[342] Ibid., p. 25.

[343] Ibid., p. 26.

[344] This interpretation was placed on the *Nottebohm* case by the Italian-United States Conciliation commission in the *Flegenheimer* case (1958), 25 I.L.R., p. 148.

[345] For a more comprehensive argument in favour of limiting the scope of the *Nottebohm* case, see the First Report of the *Special Rapporteur* on Diplomatic Protection, document A/CN.4/506, paras. 106-120.

[346] See, also, article 3 (2) of the 1997 European Convention on Nationality.

rights, require States to comply with international standards in the granting of nationality.[347] For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

> "States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."[348]

(8) Paragraph 2 therefore recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Paragraph 2 requires that nationality should be acquired in a manner "not inconsistent with international law". The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a "margin of appreciation" in deciding upon the conferment of nationality[349] and that there is a presumption in favour of the validity of a State's conferment of nationality.[350]

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[347] This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica*, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State "with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights" (79 *International Law Reports*, p. 296).

[348] See too, article 20 of the American Convention on Human Rights, United Nations, *Treaty Series*, vol. 1144, p. 123, and article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, *Treaty Series*, vol. 660, p. 195.

[349] See the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, 79 *International Law Reports*, pp. 302-3.

[350] R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (1992), p. 856.

Article 4 [9]

Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

Commentary

(1) Although the continuous nationality rule is well established,[351] it has been subjected to considerable criticism[352] on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to "nationality shopping" for the purpose of diplomatic protection.[353] The Commission is of the view that the continuous nationality rule should be retained but that exceptions should be allowed to accommodate cases in which unfairness might otherwise result.

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[351] See, for instance, the decision of the United States-Yugoslavia Claim Commission in the *Kren* claim, 20 *International Law Reports*, p. 234.

[352] See the comment of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case 1970 *I.C.J. Reports* pp. 101-102; see too E. Wyler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (1990).

[353] See the statement of Umpire Parker in *Administrative Decision No. V* (1925) 19 *A.J.I.L.*, pp. 612-614: "any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency on behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims".

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises.[354] In these circumstances the Commission decided to leave open the question whether nationality has to be retained between injury and presentation of the claim.[355]

(3) The first requirement is that the injured national be a national of the claimant State at the time of the injury. Normally the date of the injury giving rise to the responsibility of the State for an internationally wrongful act will coincide with the date on which the injurious act occurred.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim[356] is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim.[357] The phrase "presentation of the claim" is that most frequently used in treaties, judicial decisions and doctrine. The Commission has added the word "official" to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

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[354] H. Briggs "La Protection Diplomatique des Individus en Droit International: La Nationalité des Réclamations", (1965 I), *Annuaire de l'Institut de Droit International*, pp. 72-73.

[355] The same approach was adopted by the Institute of International Law in its Warsaw Session, 1965: (1965 II), *Annuaire de l'Institut de Droit International*, vol. 51, pp. 260-262.

[356] According to a view, the concept of "nationality of the claim" gave rise to confusion since it was a common law concept that was not known to other legal systems.

[357] See the dictum of Umpire Parker in *Administrative Decisions No. V* (1925) 19 *A.J.I.L.*, pp. 616-617.

(5) The word "claim" in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the draft articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto.[358]

(6) While the Commission decided that it was necessary to retain the continuous nationality rule it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury provided that three conditions are met: first, the person seeking diplomatic protection has lost his or her former nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(7) Loss of nationality may occur voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(8) As discussed above,[359] fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States.

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[358] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 301.

[359] See paragraph (1).

(9) The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with article 3, paragraph 2.

(10) Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.

Article 5 [7]

Multiple nationality and claim against a third State

> 1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.
>
> 2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Commentary

(1) Although some domestic legal systems prohibit their nationals from acquiring dual or multiple nationality it must be accepted that dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization, which does not result in the renunciation of a prior nationality. International law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

> "… a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Article 5 is limited to the exercise of diplomatic protection by one of the States of which the injured person is a national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in article 6.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like article 3, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions[360] and codification endeavours,[361] the weight of authority does not require such a condition. In the *Salem* case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that

> "the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two Powers whose National is interested in the case by referring to the nationality of the other Power."[362]

This rule has been followed in other cases[363] and has more recently been upheld by the Iran-United States Claim Tribunal.[364] The Commission's decision not to require a genuine or effective link in such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

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[360] See the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal in the *de Born* case, *Annual Digest and Reports of Public International Law Cases* 1925-26, case No. 205.

[361] See article 5 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws; resolution on "*Le Caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu*" adopted by the Institute of International Law at its Warsaw Session in 1965: *Résolutions de l'Institut de Droit International*, 1957-1991 (1992), p. 56 (art. 4 (b)); 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, article 23 (3), in L.B. Sohn and R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961) 55 *A.J.I.L.*, p. 548; Garcia Amador, Third Report on State Responsibility, in *Yearbook … 1958*, vol. II, p. 61 (art. 21 (3)), document A/CN.4/111.

[362] 2 *U.N.R.I.A.A.*, p. 1188 (1932).

[363] See the decisions of the Italian-United States Conciliation Commission in the *Mergé* claim 22 I.L.R., p. 456 (p. 155), the *Verano* claim 25 I.L.R., pp. 464-465 (1957), and the *Stnakovic* claim 40 I.L.R., p. 155 (1963).

[364] See *Dallal v. Iran* 3 *I.U.S.C.T.R.*, p. 23 (1983).

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law governing the satisfaction of joint claims.

Article 6

Multiple nationality and claim against a State of nationality

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Commentary

(1) Article 6 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas article 5, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, article 6 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.

(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares in article 4 that:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[365]

Later codification proposals adopted a similar approach[366] and there was also support for this position in arbitral awards.[367] In 1949 in its advisory opinion in the case concerning *Reparation for Injuries*, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as "the ordinary practice".[368]

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality.[369] This jurisprudence was relied on by the

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[365] See, too, article 16 (a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, (1929) 23 *A.J.I.L.*, Special Supplement 22.

[366] See article 23 (5) of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens, (1961) 55 *A.J.I.L.*, p. 545; article 4 (a) of resolution on "*Le Caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu*" adopted by the Institute of International Law at its 1965 Warsaw Session, article 4 (a). *Résolutions de l'Institut de Droit International*, 1957-91 (1992) 56; 1985 (II) *Annuaire de l'Institut de Droit International* 260-2.

[367] See *Alexander* case (1898) 3 Moore, *International Arbitrations*, p. 2529 (United States-British Claims Commission); *Oldenbourg* case, Decisions and Opinions of Commissioners, 5 October 1929 to 15 February 1930, p. 97 and *Honey* case, Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930, p. 13 (British-Mexican Claims Commission); *Adams and Blackmore* case 5 *U.N.R.I.A.A.*, pp. 216-217 (British-Mexican Claims Commission).

[368] 1949 *I.C.J. Reports*, p. 186.

[369] *James Louis Drummond* case 2 Knapp, P.C. Rep., p. 295, 12 Eng. Rep. p. 492; *Milani*, *Brignone Stevenson* and *Mathinson* cases (British-Venezuelan Mixed Claim Commission) reported in Ralston, *Venezuelan Arbitrations of 1903*, pp. 429-438, 710, 754-761, 438-455 respectively; *Carnevaro* case (Permanent Court of Arbitration, 1912) reported in Scott, *The Hague Court Reports*, vol. 1, at p. 284; *Hein* case (Anglo-German Mixed Arbitral Tribunal), *Annual Digest and Reports of Public International Law* cases 1919-1922, case No. 148, p. 216; *Blumenthal* case (French-German Mixed Tribunal), *Recueil des Décisions des Tribunaux Mixtes*,

International Court of Justice in another context in the *Nottebohm* case[370] and was given explicit approval by Italian-United States Conciliation Commission in the *Mergé* claim in 1955. Here the Commission stated that:

> "The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty."[371]

In its opinion the Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Commission in over 50 subsequent cases concerning dual nationals.[372] Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases.[373] Another institution which gives support to the dominant nationality principle is the United Nations Compensation Commission established by the Security Council to provide for compensation for damages caused by Iraq's occupation of

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vol. 3 (1924), p. 616; *de Montfort* case (French-German Mixed Tribunal), *Annual Digest and Reports of Public International Law Cases* 1925-26, case No. 206, p. 279; *Pinson* case (French-Mexican Mixed Claims Commission), *Annual Digest of Reports and Public International Law Cases* 1927-28, cases No. 19 and 195, pp. 297-301; *Tellech* case (US-Austria and Hungary Tripartite Claim Commission), (1928) 2 *U.N.R.I.A.A.*, p. 248.

[370] 1955 *I.C.J. Reports*, pp. 22-23. *Nottebohm* was not concerned with dual nationality but the Court found support for its finding that *Nottebohm* had no effective link with Liechtenstein in judicial decisions such as those referred to in footnote 369.

[371] (1955) 22 I.L.R., p. 455 (para. V. 5). See too (1955) 16 *U.N.R.I.A.A.* p. 247.

[372] See, for example, *Spaulding* claim (1956) 25 I.L.R., p. 452; *Zangrilli* claim (1956) 25 I.L.R., p. 454; *Cestra* claim (1957) 25 I.L.R., p. 454; *Puccini* claim (1957) 25 I.L.R., p. 454; *Salvoni Estate* claim (1957) 25 I.L.R., p. 455; *Ruspoli* claim (1957) 25 I.L.R., p. 457; *Ganapini* claim (1959) 30 I.L.R., p. 366; *Turri* claim (1960) 30 I.L.R., p. 371; *Graniero* claim (1959) 30 I.L.R., p. 451; *Di cicio* claim (1962) 40 I.L.R., p. 148.

[373] See, in particular, *Esphahanian v. Bank Tejarat* (1983) 21 *I.U.S.C.T.R.*, p. 166; case No. A/18 (1984) 5 I.U.S.C.T.R., p. 251.

Kuwait. The condition applied by the Commission for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State.[374] Recent codification proposals have given approval to this approach. In his Third Report on State Responsibility to the International Law Commission, Garcia Amador proposed that:

> "In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties."[375]

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.[376]

(4) The Commission is of the opinion that the principle which allows a State of dominant or effective nationality to bring a claim against another State of nationality reflects the present position in customary international law. Moreover, it is consistent with developments in international human rights law, which accords legal protection to individuals, even against a State of which they are nationals. This conclusion is given effect to in article 6.

(5) The authorities use the term "effective" or "dominant" to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. The Commission decided not to use either of these words to describe the required link but instead to use the term "predominant" as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term "predominant" when applied to nationality than either "effective" or "dominant". It is moreover the term used by the Italian-United States Conciliation Commission in the *Mergé* claim which may be seen as the starting point for the development of the present customary rule.[377]

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[374] S/AC.26/1991/Rev.1, para. 11.

[375] A/CN.4/111, in *Yearbook ... 1958*, vol. II, p. 61.

[376] "Interim Report on the 'The Changing Law of Nationality of Claims'" in *International Law Association, Report of the 69th Conference* (2000), p. 646 (para. 11).

[377] See above at footnote 371.

(6) The Commission makes no attempt to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.

(7) Article 6 is framed in negative language: "A State of nationality may *not* exercise diplomatic protection … *unless*" its nationality is predominant. This is intended to show that the circumstances envisaged by article 6 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(8) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the time of the injury and at the date of the official presentation of the claim. This requirement echoes the principle affirmed in article 4, paragraph 1, on the subject of continuous nationality. The phrases "at the time of the injury" and "at the date of the official presentation of the claim" are explained in the commentary on this article. The exception to the continuous nationality rule contained in article 4, paragraph 2, is not applicable here as the injured person contemplated in article 6 will not have lost his or her other nationality.

Article 7 [8]

Stateless persons and refugees

> 1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Commentary

(1) The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. In 1931 the United States-Mexican Claims Commission in *Dickson Car Wheel Company v. United Mexican States* held that a stateless person could not be the beneficiary of diplomatic protection when it stated:

> "A State … does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury."[378]

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961[379] and the Convention on the Status of Refugees of 1951.[380]

(2) Article 7, an exercise in progressive development of the law, departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although the Commission has acted within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

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[378] 4 *U.N.R.I.A.A.*, p. 678 (1931)

[379] United Nations, *Treaty Series*, vol. 989, p. 175.

[380] United Nations, *Treaty Series*, vol. 189, p. 150.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954[381] which defines a stateless person "as a person who is not considered as a national by any State under the operation of its law".[382] This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim.

(4) The requirement of both lawful residence and habitual residence sets a high threshold.[383] Whereas some members of the Commission believed that this threshold is too high and could lead to a situation of lack of effective protection for the individuals involved, the majority took the view that the combination of lawful residence and habitual residence approximates to the requirement of effectiveness invoked in respect of nationality and is justified in the case of an exceptional measure introduced *de lege ferenda*.

(5) The temporal requirements for the bringing of a claim contained in article 4 are repeated in paragraph 1 The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim. This ensures that non-nationals are subject to the same rules as nationals in respect of the temporal requirements for the bringing of a claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are "unable or unwilling to avail [themselves] of the protection of [the State of

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[381] United Nations, *Treaty Series*, vol. 360, p. 117.

[382] Article 1.

[383] The terms "lawful and habitual" residence are based on the 1997 European Convention on Nationality, article 6 (4) (g), where they are used in connection with the acquisition of nationality. See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a "stateless person having his habitual residence in that State" (art. 21 (3) (c)).

Nationality]"[384] and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain the decision of the Commission to allocate a separate paragraph to each category.

(7) The Commission decided to insist on lawful residence and habitual residence as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons, despite the fact that article 28 of the Convention Relating to the Status of Refugees sets the lower threshold of "lawfully staying"[385] for Contracting States in the issuing of travel documents to refugees. The Commission was influenced by two factors in reaching this decision. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.[386] Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda.* Some members of the Commission argued that the threshold of lawful and habitual residence as preconditions for the exercise of diplomatic protection was too high in the case of both stateless persons and refugees.[387]

(8) The term "refugee" in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term "recognized refugees", which appears in the 1997 European Convention on Nationality,[388] which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the

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[384] Article 1 (A) (2) of the Convention Relating to the Status of Refugees.

[385] The *travaux préparatoires* of the Convention make it clear that "stay" means less than durable residence.

[386] See paragraph 16 of the Schedule to the Convention.

[387] See paragraph (4) above.

[388] Article 6 (4) (g).

Specific Aspects of Refugee Problems in Africa,[389] widely seen as the model for the international protection of refugees,[390] and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America approved by the General Assembly of the O.A.S. in 1985.[391] However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it considered and treated as a refugee. This would be of particular importance for refugees in States not party to the existing international or regional instruments.

(9) The temporal requirements for the bringing of a claim contained in article 4 are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

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[389] United Nations, *Treaty Series*, vol. 1001, p. 45. This Convention extends the definition of refugee to include "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

[390] Note on International Protection submitted by the United Nations High Commissioner for Refugees, G.A.O.R., forty-fifth session, document A/AC.96/830, p. 17, para. 35.

[391] O.A.S. General Assembly, XV Regular Session (1985), Resolution approved by the General Commission held at its fifth session on 7 December 1985.

(11) Both paragraphs 1 and 2 provide that a State of refuge "*may* exercise diplomatic protection". This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national:[392] *A fortiori* it has a discretion whether to extend such protection to a stateless person or refugee.

(12) The Commission stresses that article 7 is concerned only with the diplomatic protection of stateless persons and refugees. It is *not* concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Article 28 of the 1951 Convention Relating to the Status of Refugees, read with paragraph 15 of its Schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. *A fortiori* the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

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[392] See article 2 and the commentary thereto.

CHAPTER VI

UNILATERAL ACTS OF STATES

A. Introduction

282. In the report on the work of its forty-eighth session, in 1996, the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[393]

283. The General Assembly, in paragraph 13 of resolution 51/160, inter alia, invited the Commission to further examine the topic "Unilateral Acts of States" and to indicate its scope and content.

284. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[394]

285. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodriguez Cedeño, Special Rapporteur on the topic.[395]

286. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission's decision to include the topic in its agenda.

287. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic.[396] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

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[393] *Official Records of the General Assembly, Fifty-first session, Supplement No. 10* (A/51/10) p. 230 and pp. 328-329.

[394] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), paras. 196-210 and 194.

[395] Ibid., paras. 212 and 234.

[396] A/CN.4/486.

288. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[397]

289. At its fifty-first session in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.[398] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

290. The Working Group reported to the Commission on issues related to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

291. At its fifty-second session in 2000, the Commission considered the third report of the Special Rapporteur on the topic,[399] along with the text of the replies received from States[400] to the questionnaire on the topic circulated on 30 September 1999. The Commission at its 2633rd meeting on 7 June 2000 decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

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[397] *Official Records of the General Assembly, Fifty-third session, Supplement No. 10* (A/53/10), paras. 192-201.

[398] A/CN.4/500 and Add.1.

[399] A/CN.4/505.

[400] A/CN.4/500 and Add.1.

292. At its fifty-third session in 2001, the Commission considered the fourth report of the Special Rapporteur[401] and established an open-ended Working Group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

B. Consideration of the topic at the present session

293. At the present session the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/525 and Add.1 and 2 and Corr.1, Corr.2 (Arabic and English only) and Add.2) and the text of replies received from States (A/CN.4/524) to the questionnaire on the topic circulated on 31 August 2001.

294. The Commission considered the fifth report of the Special Rapporteur at its 2720th, 2722nd, 2723rd, 2725th, 2726th, 2727th meetings on 15, 21, 22, 24, 28 and 30 May 2002, respectively.

295. At its 2727th meeting held on 30 May 2002, the Commission established an open-ended informal consultation, to be chaired by the Special Rapporteur, on unilateral acts of States.

1. Introduction by the Special Rapporteur of his fifth report

296. The Special Rapporteur indicated that, in response to suggestions made the previous year, his fifth report provided a recapitulation of the progress made on the topic and the reasons why certain concepts and terms had been changed.

297. Chapter I, referred to previous consideration of the topic, consideration of international practice, the viability and difficulties of the topic and the recapitulative nature of some parts of the fifth report.

298. Chapter II dealt with four aspects of the topic considered by the Commission at its previous sessions: definition of unilateral acts; conditions of validity and causes of invalidity; rules of interpretation; and classification of unilateral acts.

299. Chapter III examined three questions that might make possible the elaboration of common rules applicable to all such acts, regardless of their material content and their legal effects: the rule regarding respect for unilateral acts, the application of the act in time, and its territorial application.

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[401] A/CN.4/519.

300. Chapter IV dealt briefly with the equally important subject of determination of the moment at which the unilateral act produced its legal effects, and would encompass three extremely important and complex issues: revocation, modification and suspension of the application of the act, and its termination.

301. Lastly, chapter V set out the structure of the articles already drafted and the future plan of work.

302. In his introduction of document A/CN.4/525 the Special Rapporteur reiterated that the topic of unilateral acts was highly complex and had proved difficult to tackle. He had considered the most important jurisprudence and the extensive literature in depth, but unfortunately, he had been unable to consider the full range of State practice, for various reasons, including very limited replies by States to the 2001 questionnaire. The information available on State practice being basically factual, serious difficulties arose in determining States' beliefs regarding the performance of those acts, their nature and the intended effects. He indicated that the question of whether the numerous unilateral acts by States were political or legal could be resolved only through an interpretation of the author States' intention - a highly complex and subjective issue.

303. Though treaties were the form most widely used by States in their international legal relations, unilateral acts of States were increasingly used as a means of conditioning their subsequent conduct. According to general international law, a State could formulate an act without any need for participation by another State, with the intention of producing certain legal effects, without the need for any form of acceptance by the addressee or addressees.

304. In chapter I, as a further illustration of the difficulties to which the topic gave rise, it was noted that, with the exception of a protest, the other unilateral acts considered by the Commission to be the most frequent, namely, waiver, recognition and promise, were not always expressed through declarations, and, furthermore, were not always unilateral, thus falling outside the scope of the Commission's endeavour.

305. In recapitulating the constituent elements found in the definition of unilateral acts, the Special Rapporteur explained the various modifications introduced to the draft definition presented in his first report, such as the use of the word "act", the inclusion of the phrase "unequivocal expression of will which is formulated by a State with the intention of producing legal effects" and the exclusion of the concept of "autonomy".

306. The Special Rapporteur noted that although the definition gave States alone the capability to formulate unilateral acts - the matter covered by the Commission's mandate - this should in no way be construed as meaning that other subjects of international law, particularly international organizations, could not do so. The notion of addressee was seen in broad terms, such that a unilateral act could be directed not only at one or more States, but also at an international organization. In this connection he recalled that some members of the Commission believed that other international legal entities, such as liberation movements, could be the addressees of such acts and that this raised a number of issues that deserved measured consideration.

307. He also noted that the definition of unilateral acts before the Drafting Committee was the result of extensive consideration which had taken into account comments by members of the Commission and by Governments; the adoption of the definition was deemed crucial in order to permit progress on other draft articles.

308. In his introduction to the addendum to his fifth report (A/CN.4/525/Add.1), the Special Rapporteur addressed certain aspects of the topic in a complementary rather than recapitulative manner. The addendum dealt with the conditions of validity and causes of invalidity, interpretation and classification of unilateral acts.

309. One of the comments at the previous session was that the causes of invalidity should be considered along with the conditions of validity of a unilateral act and should be viewed broadly, not solely in terms of defects in the manifestation of will. Other causes of invalidity that might affect the validity of the unilateral act should be considered, it had been suggested, including the capacity of the author, the viability of consent and the lawfulness of the object of the unilateral act.

310. Though references to such issues in the literature were minimal, and relevant practice seemed virtually non-existent, the Special Rapporteur was of view that the provisions of the 1969 Vienna Convention on the Law of Treaties, specifically articles 42 to 53 and 69 to 71, could serve as a valid reference point.

311. He felt that some reference should be made to the conditions of validity, even if no specific provision was included in the draft articles; this was why the conditions of validity of a unilateral act were set out in the report.

312. In this connection, he stated that the Commission's mandate was restricted to unilateral acts of States and that therefore it was the State that had to formulate a unilateral act although, as previously indicated, other subjects of international law were not precluded from doing so. In addition, a unilateral act had to be formulated by a person who had the capacity to act and undertake commitments at the international level on behalf of the State.

313. Another condition for the validity of a unilateral act was the lawfulness of its object. The unilateral act must not conflict with a peremptory norm of international law or *jus cogens*. In addition, the manifestation of will must be free of defects.

314. The Special Rapporteur recalled that the regime governing invalidity in international law was certainly one of the most complex aspects of the study of international legal acts in general. A related issue raised was the effects of a unilateral act that conflicted with a previous act, whether conventional or unilateral: in other words, a unilateral act that was contrary to obligations entered into previously by the same State. Reference was also made to absolute invalidity, where the act could not be confirmed or validated, and to relative validity, where it could. In the first case, the act conflicted with a peremptory norm of international law or *jus cogens* or was formulated as a result of coercion of the representative of the State that was the author of the act; in the second, other causes of invalidity could be overcome by the parties and the act could therefore have legal effects.

315. In his fifth report, the single draft article on causes of invalidity submitted previously had been replaced by separate provisions, in response to comments made by members of the Commission and of the Sixth Committee. By referring to "State or States" the new version also catered for the possibility that a State might invoke invalidity in the case of a unilateral act that had a collective origin.

316. It was also noted that in the new version of draft article 5, the State or States that had formulated the act could invoke error, fraud or corruption of an official as defects in the expression of will, whereas any State could invoke the invalidity of a unilateral act if the act was contrary to a peremptory norm of international law (*jus cogens*) or a decision of the Security Council under chapter VII of the Charter.

317. The Special Rapporteur stated that a number of issues remained unresolved and could be the subject of further consideration. One was the possibility, in the case of unilateral acts of collective origin, that one of the States that participated in the formulation of the act might

invoke invalidity. Another was the effects that the invalidity of the act could have on legal relations between the State that invoked invalidity and the other States that had participated in the formulation of the act and on their relations with its addressee. Furthermore, consideration would have to be given, inter alia, to stipulation in favour of third parties, in which case, if the act that gave rise to the relationship was invalidated, the relationship with the third State was terminated. In that context, the Special Rapporteur recalled that article 69 of the Vienna Convention of 1969 set out the consequences of invalidity of an act, which differed from those posited for a unilateral act of collective origin. He indicated that comments on that point could be reflected in a future provision on the subject.

318. The diversity of unilateral acts could have an impact on the capacity to invoke the invalidity of the act. In the case of promise or recognition, for example, the author State could invoke the invalidity of the act, but in the case of protest, the situation was not the same: while the author State could hardly invoke the invalidity of the act, nothing would seem to prevent the addressee State from doing so.

319. Another issue taken up in the report but not reflected in actual wording was whether the author State could lose the right to invoke a cause of invalidity or a ground for putting an end to an act by its conduct or attitude, whether implicit or explicit.

320. The question was raised whether a State could validate any and all unilateral acts through its subsequent behaviour, or whether a distinction had to be made according to the differing legal effects of the act. Protest, for example, might be approached from a different angle.

321. Another issue touched on in the report was invalidation of a unilateral act because of a violation of domestic law concerning competence to formulate unilateral acts and the particular restriction of the power to express will. According to the Vienna regime, that cause could be invoked only if the violation was manifest and if it concerned a norm of fundamental importance to the domestic law of the State.

322. Another matter addressed in the report was the interpretation of unilateral acts. The Special Rapporteur was of the view that because expression of will was involved, rules on interpretation could be applied to all unilateral acts, irrespective of their content. Accordingly, he had tried to establish a general rule and one on supplementary means of interpretation, as in the Vienna regime but taking into account the specific features of unilateral acts.

323. Although the draft article on interpretation did not expressly refer to the restrictive character of interpretation, such a reference could be included or the concept could be reflected in the commentary.

324. Another issue tackled in the addendum to the report was the classification of unilateral acts. While some might not perceive a classification to be useful, the Special Rapporteur considered that it could help in grouping and structuring the draft articles. He also stated that even if the classification could not be done for the time being, the Commission should take a final decision on whether to elaborate rules for a category of unilateral acts like promises, which signified the assumption of unilateral obligations by the author State. The next report could then address the complex issues of revocation, modification, termination and suspension of unilateral acts, which could be handled more easily if compared solely with that kind of act.

325. He indicated that the revocation of a unilateral act could not be the subject of a rule that applied to all acts. The revocation of a promise or of an act whereby a State assumed a unilateral obligation did not seem to be the same as the revocation of an act whereby a State reaffirmed a right.

326. The termination and suspension of application of a unilateral act must also be considered in terms of the unilateral act's specific features. In his view rules on the termination of the unilateral act should be elaborated along the lines of those laid down for treaties in articles 59 et seq. of the 1969 Vienna Convention, and the consequences of termination and suspension of application should be examined on the basis of articles 70 and 72 of the Convention, but with due regard for the particular features of the unilateral act.

327. The Special Rapporteur felt that such questions, which could not be the subject of common rules, could be addressed by the Commission and the Working Group that was to be set up.

2. Summary of the debate

328. Members expressed their appreciation for the fifth report of the Special Rapporteur which reviewed a number of fundamental questions on a complex topic that, although not lending itself readily to the formulation of rules, was nonetheless of great importance in international relations. According to another view, the fifth report had not taken a new approach to the topic on the basis of the criticisms and comments made nor had it proposed new draft articles in light of those considerations.

329. Some members reiterated that the topic of unilateral acts of States lent itself to codification and progressive development by the Commission since there was already extensive State practice, precedent and doctrine. It was felt that the work would be useful for States in order to know as precisely as possible what risks they ran in formulating such acts.

330. Nonetheless, a member made the point that fundamental doubts existed on the direction and content of the work on the topic. In this connection, it was stated that the language of draft article 1, which spoke of unilateral acts as acts "with the intention of producing legal effects", and draft article 5, which used the phrase "formulation of a unilateral act" and referred to the conditions of validity of unilateral acts as well as their interpretation, were problematic. The draft articles suggested that a unilateral act was to be taken as a fully voluntary scheme or law, a kind of promise or unilateral declaration.

331. From this point of view however, it was difficult to recall a single case in which a State had *unilaterally* made a promise and had held itself legally bound by it without expecting reciprocity on the part of any other State.

332. In the relevant practice, the actor State itself had never conceived of acting in terms of a formulation in order to create legal effects. On the contrary, it had found itself bound by the way it had acted or failed to act or what it had said or failed to say, irrespective of any formulation that it might have made about how it had acted or what it had said.

333. As regards some of the difficulties posed by the topic, the same member stated that in the past the Commission had successfully considered topics dealing with legal institutions which could be defined and set off from the rest of the legal order, whereas unilateral acts were a catch-all term to describe ways in which States sometimes were bound other than through the effects of particular institutions or the special ways in which States acted so as to create legal effects. Consequently, the Commission was trying to codify something which did not exist as a legal institution and was at a loss as to how to define it so as to make it a legal institution.

334. Furthermore, another difficulty was that the very concept of a unilateral act was fundamentally ambivalent in that it described two different things. On the one hand, it was a sociological description of States acting. States undertook thousands of acts, and they did so in a unilateral way in the sense that they decided to act as individual identities. On the other hand, the concept also referred to a legal mechanism whereby the legal order projected norms and obligations on the way those States acted and attached legal consequences to their actions; it was a mechanism in which the legal order acted irrespective of the actors themselves.

335. According to this view, when States unilaterally came together in the world of diplomacy, they created expectations, which good faith demanded that they not disappoint. That mechanism was impossible to describe in terms of a voluntary scheme in which States had the intention of creating legal effects and in which they formulated actions that then did so.

336. Consequently, the legal order attached obligatory force to some actions in a manner different from treaties or from other legal institutions, inasmuch as it was a question of creating not universal law but contextual law, a bilateral opposability that existed between the acting State and States in which expectations had been created through particular action.

337. From this perspective, no general rules could be devised, because particular relationships like those between France, New Zealand and Australia in the *Nuclear Tests* case or between Cambodia and Thailand in the *Temple of Preah Vihear* case had been the products of a long history and a geographical situation that could not be generalized. The opposability created through unilateral acts could not be made subject to general criteria of understanding, because it was outside international institutions and had to do with what was reasonable in the context of human behaviour and the history of the States concerned.

338. The approach suggested was based on the assumption that unilateral acts existed as a phenomenon in the social world. Those acts were sometimes linked to legal institutions such as treaties and customary law. In the case of unilateral acts, it was not apparent what institution converted an act into an obligation. According to one thesis, no such institution existed, so that unilateral acts simply fell outside the realm of legality. Sometimes, however, an invisible institution created a link between an act and an obligation. That invisible institution was an amorphous conception of what was just and reasonable in a particular circumstance.

339. Consequently, it was stated that the Commission should abandon the voluntary scheme based on States' intentions and should focus on the reasonable aspects of the issue in terms of expectations raised and legal obligations incurred. It should also abandon the analogy with the law of treaties, which took an impersonal approach to the entire field of diplomacy, and should instead base its considerations on the law of social relations, where individuals exercised greater or lesser degrees of power in the complex web of relationships. The Commission might wish to formulate general principles articulating the manner in which particular relationships between States became binding, an endeavour which would be tremendously ambitious and perhaps unfeasible.

340. Alternatively, the Commission might fill the vacuum created by the absence of a legal institution by considering the institution of recognition of States, an institution which, while operating on a level different from that of treaties or custom, nevertheless served as a link between forms of behaviour and legal obligations. Some other members agreed with various aspects of the views described above.

341. While acknowledging that the topic of unilateral acts was indeed different from the more traditional topics, it was also stated that the Commission had virtually exhausted the latter and that consequently, it was obliged to embark upon new studies that presented a challenge, but also an opportunity for innovative and progressive development and codification.

342. As to the assertion that the Commission was attempting to codify something which did not exist as a legal institution, the point was made that whether unilateral acts were an institution depended on one's definition of that term. The fundamental question faced by the Commission was whether a certain legal phenomenon called a "unilateral act" existed in international law and, if so, what legal regime governed it. Furthermore, under article 15 of its Statute, it was the Commission's task to create intellectual concepts where they did not yet exist and to clarify them where needed.

343. Some Members of the Commission voiced their disagreement with pursuing an approach according to which treaties, as an act of will, were the only means of regulating the world of diplomacy. In this connection, it was noted that the relationship between a State's will and its intention was hard to unravel and, furthermore, it was difficult to pinpoint the frontier between the realms of will and of intention.

344. It was also stated that although international law was not based entirely on the expression of the will of States, it was plain that, insofar as they were bound by treaty obligations and by unilateral acts, it was by their own individual or collective wish.

345. Doubts were also expressed on the validity of the submission that the category of relevant institutions for the exercise the Commission had undertaken was comprised only of treaties and custom. It was stated that, in addition to treaty obligations and obligations under customary international law, there were clearly also some international obligations stemming from unilateral acts of States. One obvious example, recognition, was a unilateral political act that also gave rise to legal effects on the international plane. Therefore it was suggested that the Special Rapporteur could focus less on the behaviour and intentions of the actor State, and more on the effects of the unilateral act on other States.

346. Recalling that the reason why treaties must be respected was encapsulated in the adage *pacta sunt servanda*, it was noted that one interesting aspect of the codification exercise proposed by the Special Rapporteur was the idea that, *mutatis mutandis*, the same was true of unilateral acts: in other words, that *acta sunt servanda*. The precise conditions under which the latter adage was applicable would of course need to be determined. However, it was not for the Commission to delve into the recondite reasons underlying that principle.

347. In relation to the issue of reciprocity, it was stated that although a State would not normally formulate a unilateral act without some benefit to itself, such benefits did not necessarily constitute reciprocity. This would be the case, for example, of a promise made by a requesting State to a requested State that the death penalty would not be applied to an individual whose extradition is sought.

348. In this connection, it was also noted that in recent State practice a dispute had in effect arisen over the question of which national body was competent to make such a promise on behalf of the requesting State: its Parliament or its Government. This demonstrated that the articles proposed by the Special Rapporteur on the representation of States in the formulation of unilateral acts and on the international relevance of domestic constitutional provisions corresponded to practical needs.

349. Furthermore, it was said that no contradiction existed between the intention to be bound as a factor underlying unilateral acts, on the one hand, and a declaration creating legitimate expectations, on the other; the two concepts being complementary in nature.

350. In relation to the argument that unilateral acts raised only bilateral expectations, and thus did not lend themselves to codification, attention was drawn to the fact that sometimes such acts could be more general in scope. This was the case, for instance, of the protests that Portugal had presented in connection with the Timor Gap Treaty between Australia and Indonesia which had had an effect so broad as to impinge on other States and even on other entities such as multinational corporations with interests in the area. Similarly, Portugal had several times asserted that the right of self-determination of the people of East Timor had an *erga omnes* character - an assertion subsequently confirmed by the International Court of Justice in the *Case Concerning East Timor*.

351. The point was also made that the Commission should guard against watering down "hard" obligations under the law of treaties by drawing analogies between such obligations and weaker obligations undertaken in the context of unilateral acts.

352. Divergent views were expressed regarding the suggestion that the Commission consider the recognition of States. On the one hand, it was felt that the Commission was not the place to deal with human rights or highly political issues such as the one suggested. Furthermore, it was also recalled that practice and doctrine in that area was notoriously divergent, thus making it difficult to codify the law. According to another view however, rules and State practice on issues such as the recognition of States did exist, and the Commission could therefore engage in a blend of codification and progressive development in such areas, despite their political sensitivity.

353. As regards the approach of making an analogy with the law of treaties, it was stated that although the 1969 Vienna Convention could not be taken over in every respect, it could nonetheless provide guidance and give rise to fruitful debate on the extent of its applicability to unilateral acts.

354. In relation to the suggestion by the Special Rapporteur for a rule whose substance would be "*acta sunt servanda*", it was stated that positing such a principle would require the Commission to scrutinize every theoretical explanation as to the binding force of unilateral acts; therefore such a proposal could not be agreed to. Another view expressed that, at the present stage in the study of the topic, an *acta sunt servanda* provision could not go much further than a statement of the author State's duty to adopt consistent conduct in respect of that act, taking into account the principle of good faith and the need to respect the level of confidence and legitimate expectations created by the act, and also bearing in mind the diversity of unilateral acts; it was only when the Commission had moved on to specific categories of unilateral acts that the legal consequences of each act could be stated more clearly.

355. The Commission also had an exchange of views on the question of whether a unilateral act constituted a source of international law of the same rank as the usual sources, namely, treaties and custom. This posed the issue of whether a unilateral act could derogate from general international law or *erga omnes* obligations. In this connection, it was stated that a unilateral act should never take precedence over general international law or the provisions of a multilateral convention to which the author State of the unilateral act was a party. A suggestion was made that the Special Rapporteur study the relationship between unilateral acts and other sources of international law.

356. On the other hand, the point was made that unilateral acts should not be included in the classification of sources of international law. In this connection, it was stated that such acts created obligations, not law, and that the unfortunate use of the concept of "validity" throughout draft article 5 stemmed from the failure to conceptualize unilateral acts in terms of reciprocal obligations between States which could, under certain circumstances, create a network of opposabilities.

357. According to another view, the question whether unilateral acts were a source of law or a source of obligations was the result of confusion between the making of rules and the production of legal effects. If a unilateral act was placed in a specific context in real life, it would be found that, in some circumstances, it could create an obligation for the author State, that the obligation often determined the future conduct of that State and that other States might rely on that conduct. Whether as rights or as obligations, however, the legal effects of a unilateral act could not stand on their own and must be governed by international law. If the Commission took unilateral acts out of the context of existing law, particularly treaty relations, and treated them as purely creating legal effects in terms of rights and obligations, it might easily get disoriented because it was placing too much emphasis on criteria for the formulation of such acts.

358. It was also said that unilateral acts and the different forms in which they were expressed could be of interest and have legal effects, but that they lacked the value of international obligations in and of themselves. They could be assessed only in light of the responses, actions and acceptance of other States in one form or another.

359. Disagreement however was expressed to such an approach since a promise to do something, recognition of another State or of a situation, waiver of a right or protest against the conduct of another subject of international law did indeed produce legal effects, although in some cases only if other States or an international court took the author State at its word.

360. In addition, attention was drawn to the fact that, even if unilateral acts were not per se law-creating or norm-creating mechanisms, they might mark the beginning of a State practice which, in turn, created a norm.

361. There was also a discussion in the Commission about the termination of the obligation created by a unilateral act. It was noted that in the case of a treaty there was a procedure and an agreed methodology which must be respected, whereas, in the case of a unilateral act, only estoppel, acquiescence or the existence of a treaty, custom or other obligation prevented an equally unilateral termination.

362. However, according to another view, a unilateral act could not be revoked at any time because a State which had unilaterally expressed its will to be bound was, in fact, bound. Reference was made to 1974 Judgment in the *Nuclear Tests* case, where the International Court of Justice had stated that the unilateral undertaking "could not be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration". Unilateral acts, like treaties, lead to situations in which States were caught against their will; once expressed, their commitment was irrevocable, yet the treaty or act had no effect unless invoked by other States. Nonetheless, the point was also made that a unilateral act could be terminated in good faith and that the technique of revocation deserved its place in the study of means of terminating unilateral acts.

363. A suggestion was also made for the Special Rapporteur to address the issue of the legal effects of unilateral acts over time, as well as the relationship between unilateral acts of States and the conduct of States and consider those related concepts. Furthermore, consideration could also be given as to whether a unilateral act must be confirmed and, if so, how the issues raised by silence could be dealt with.

364. Divergent views were expressed on the classification of unilateral acts. On the one hand, it was said that States obviously intended their unilateral acts to produce legal effects. In that sense, there was no difference between such acts and treaties, which were also impossible to reduce to a single homogeneous category but were nevertheless subject to the application of common rules. Unilateral acts could thus be divided into two categories, at least with regard to their effects. However, rather than the classification proposed by the Special Rapporteur, it was suggested to distinguish between "condition" acts such as notification and its negative counterpart, protest, which were necessary in order for another act to produce legal effects, and "autonomous" acts which produced legal effects, such as promise, waiver, which might be regarded as the opposite, and recognition, which was a kind of promise. In studying legal effects, a distinction would doubtless need to be made in those two categories, but it should be possible to arrive at a definition of, and a common legal regime governing, unilateral acts.

365. On the other hand, the point was also made that the proposal by the Special Rapporteur to distinguish between those unilateral acts whereby States reaffirmed rights and those that were a source of obligations was unacceptable. For instance, the declaration of neutrality cited as an example was both a source of rights for the author State and a source of obligations for the belligerent States to which it was addressed. To treat such a declaration as a waiver or a promise

was not a satisfactory solution because the author State might subsequently decide to join in the conflict on grounds of self-defence if it was attacked by one of the belligerents.

366. According to another view, the Commission should refrain from attempting to classify unilateral acts; the literature had addressed the issue without great success and international jurisprudence apparently had little interest in establishing a hierarchy between them. The view was also expressed that a classification was premature; collecting and analysing information on State practice should constitute a prior step.

367. Divergent views were also expressed on the approach that the Commission could take on the topic of unilateral acts. Some members of the Commission felt that it was perfectly possible to establish a set of minimum general rules governing unilateral acts, which are indeed part of international law. It was stated that a general theory on unilateral acts should not be restricted to the four specific acts referred to by the Special Rapporteur, nor should it require that the effects of those unilateral acts necessarily be obligations; furthermore, the relationship involved could be not just bilateral or trilateral, but also *erga omnes*. After consideration of the general rules, the Commission could proceed to consider one or more of the four specific acts. In this regard, it was noted that recognition or promise would seem to offer the most potential as a topic for discussion.

368. The point was made that it was too late for the Commission to change its method of work. Therefore, the Commission should try to complete the task of formulating the general part of the draft articles as quickly as possible, ending its consideration of the draft articles with the question of interpretation, without attempting to formulate an *acta sunt servanda* principle or considering the questions of suspension, termination and retroactivity, which could be considered in the context of the more specific work devoted to certain unilateral acts. Subsequently, the Commission might turn to specific types of unilateral act, namely, promise, waiver, recognition and protest. At a third stage in its work, the Commission should revisit the whole range of principles established in the light of particular cases, with a view to deciding whether the elaboration of draft articles on the topic was the best way forward.

369. While expressing support for the continuation of the Commission's work, preference was voiced for extending it to include the questions of suspension and termination of unilateral acts, so as to have a comprehensive view. Another approach considered that it was extraordinarily difficult to find general rules to deal with the great variety of situations dealt with by unilateral acts, each of which was fact-based and involved long relationships between States.

370. According to another view however, the Commission could also start by considering examples of unilateral acts such as recognition, promise, waiver and protest in order to ascertain whether any general rules could be laid down. Subsequently, the Commission could embark on a more detailed study of a particular category of unilateral act; it could also pursue the endeavour with the consideration of other acts or omissions, such as silence, acquiescence and estoppel.

371. Therefore, it was also suggested that instead of seeking to subject the very wide range of unilateral acts to a single set of general rules an expository study be made of specific problems in relation to specific types of unilateral acts.

372. The point was also made that it was not enough to compile doctrine and jurisprudence on unilateral acts. Only after the completion of a study on State practice could the Commission decide whether the work should be done on a general basis or whether it should begin with a study of specific unilateral acts.

373. After noting that only three States had replied to the questionnaire addressed to Governments in 2001, it was suggested that other sources could be used, such as the compilation of State practice published by Ministries of Foreign Affairs and other yearbooks of international law. In this connection, it was proposed that a research project be undertaken, possibly with funding from a foundation, that would focus on an analysis of practice based on specific examples of the four classic categories of unilateral acts.

374. As regards the draft articles themselves, the point was made that the effects of the definition of unilateral acts contained in draft article 1 should be extended not only to States and international organizations, but also to other entities such as movements, peoples, territories and even the International Committee of the Red Cross. In this connection, attention was drawn to the need of analysing the case of unilateral acts formulated by a political entity recognized by some Governments, but not by others, or which represented a State in the process of being created, such as Palestine. Furthermore, a unilateral act could also produce effects *erga omnes*; the vital element was that the act produce consequences in the international legal system.

375. Another view suggested provisionally adopting, as a working definition, the text proposed by the Special Rapporteur. According to this view it was correct to refer in the definition to the "intention" of the State to be bound, for such an intention clearly existed in the four types of unilateral act listed; on the other hand, the word "unequivocal" seemed superfluous, for, if the expression of will was not "unequivocal", there would be a strong presumption that there was no real intention to be bound. In this connection, it was also noted that a declaration

with equivocal content could nevertheless bind a State if it wished to be bound. Furthermore, it was felt that the word "unequivocal" involved a problem of interpretation, not of definition and consequently had no place in draft article 1.

376. Disagreement was voiced over including the words "and which is known to that State or international organization", since it posed the same problem as "unequivocal" and introduced an element of proof that complicated the definition unnecessarily.

377. A suggestion was made to improve draft article 1 by incorporating the words "governed by international law", as contained in the Vienna Convention, as well as a reference to the non-relevance of the form that the unilateral act might take.

378. Furthermore, in relation to the definition, a query was raised as to the exclusion of the subject of conduct from the category of unilateral acts; it was also stated that more attention could also be given to the concept of silence.

379. The point was also made that a definition of unilateral acts should not be adopted until a study, based on State practice, of the various types of unilateral acts had been conducted so as to determine whether there were common characteristics.

380. Some members welcomed the draft articles on the validity of unilateral acts proposed by the Special Rapporteur, which were based on the use of the relevant provisions of the 1969 Vienna Convention, though the degree to which those provisions could be transposed to the case of unilateral acts was also questioned.

381. In this connection, several suggestions were made for more detailed consideration of the draft articles, both with regard to the subject matter and the need to take into account the relevant State practice. It was suggested that a provision based on article 64 of the Vienna Convention on the emergence of a new rule of *jus cogens* could also be included; a proposal was also put forward to enumerate the effects of the invalidity of a unilateral act rather than to stipulate which entities were able to invoke its invalidity; support was also expressed for shortening the list of causes of invalidity.

382. Another suggestion called for the inclusion of a general rule on the conditions of validity of such acts, namely, whether their content was materially possible, whether they were permissible in international law, whether there was any defect in the expression of will, whether the expression of will was a matter of public knowledge and whether the intention was to produce legal effects at the international level.

383. Furthermore, it was also stated that a distinction must be made between cases of invocation of invalidity of unilateral acts and cases in which an act was void because it conflicted with a peremptory norm of international law. In the latter case, the sanction of international law made the act void, and not the fact that the State which had formulated the act or any other State had invoked that cause.

384. In relation to the distinction drawn between absolute and relative invalidity, it was stated that the question arose whether such a distinction, which was valid in connection with the law of treaties, could be transposed to the field of unilateral acts. The main reason for drawing such a distinction in the law of treaties was to ensure that States did not jeopardize legal security by calling reciprocal commitments into question, yet no such reciprocity of wills existed in the case of unilateral acts.

385. As regards the issue of the validity of a unilateral act, the point was made that it depended on the relationship with a customary or treaty rule, namely another rule of general international law that authorized the State to act unilaterally, a matter which the Special Rapporteur could deal with.

386. The point was made that the concept of "absolute" validity was problematic and that the Commission could consider whether its use was necessary.

387. It was also stated that the notion of invalidity could lead to considerable difficulties in the case of collective unilateral acts. For instance, where the ground for invalidity was present only in the case of some of the author States, the question would arise whether the unilateral act was invalid for all the States collectively. Furthermore, it was suggested that reference to collective unilateral acts could be made in the commentary or that a separate provision could be formulated.

388. The view was also expressed that the concept on which draft article 5 was based, that unilateral acts could be viewed in terms of their validity or non-validity was considered erroneous: unilateral acts should in fact be seen in terms of opposability or non-opposability. Validity was a quality of law: when parliament passed a law, it became valid, and thus binding. Unilateral acts, on the other hand, did not comply with the formal criteria that a law must meet in order to create legal consequences. Instead, they created legal consequences in particular circumstances, in which a State's conduct was interpreted as opposable by a certain number of other States.

389. On the basis of the assumption that unilateral acts enjoyed validity, the Special Rapporteur went on to list certain conditions for invalidity, yet the list was missing the most evident condition for opposability of an act, namely, the simple case of a wrongful act, one contrary to law and to the State's obligations in the sphere of State responsibility. Clearly, a unilateral act could be non-opposable - or "invalid", to use the Special Rapporteur's term - because it was a wrongful act under a general system of law that was valid and that gave meaning to particular actions of States by projecting upon them the quality of opposability.

390. According to another view, the two concepts of opposability and validity came from two completely different areas. With regard to validity, one asked the question whether an act was in fact capable of creating obligations. Once that question was answered, one could ask for whom the act created obligations, and that could be termed opposability. Nonetheless, that lacked relevance for the subject under discussion. A unilateral act would always be opposable to the party that had validly formulated it, but the question arose whether it was also opposable to other entities. While opposability could be covered in the work on the topic, it should not preclude the Commission from looking into the causes of invalidity.

391. Disagreement was expressed over the argument that once a State intended to be bound, a valid unilateral act existed, even if the act was only opposable to that State. In this connection, it was stated that a unilateral act could not be seen in total isolation from other States; without at least bilateral relations in the sense of the act producing consequences in relation to other States, there was nothing that could be considered binding under international law.

392. Reticence was expressed on the use of the phrase "[expression of will] [consent] to be bound by the act" in draft article 5 (a), since a State might be simply asserting a right in formulating a unilateral act.

393. As regards draft article 5 (d), (e), (f), (g) and (h) as proposed by the Special Rapporteur, the point was made that although based on the 1969 Vienna Convention, they did not reproduce its terminology and could therefore be reformulated.

394. As regards draft article 5 (f), it was noted that article 53 of the Vienna Convention simply stated that a treaty "is void".

395. It was stated that invalidity should be regarded as invoked by any State, not only when a unilateral act was contrary to a peremptory norm, but also in the case of threat or use of force. In other words, it would be preferable to reintroduce in that form the distinction between absolute invalidity and relative invalidity found in the Vienna Convention.

396. Furthermore, it was pointed out that draft article 5 (g) might give rise to difficulties, for even though, in the event of a conflict of obligations, obligations under the Charter prevailed, that did not mean that a unilateral act contrary to a decision of the Security Council must necessarily be invalid; in this connection, preference was expressed for finding a formulation that would give full effect to the hierarchy of norms while avoiding the very dangerous term "invalidity"; the provision would also have no place in the section of the draft articles on invalidity.

397. Draft article 5 (h) said that the State formulating a unilateral act could invoke the invalidity of the act if it conflicted with a norm of fundamental importance to the domestic law of the State formulating it. In this connection, the query was made as to whether domestic law could be invoked to invalidate an act which had already produced international legal effects and whether that entailed the international responsibility of the author State. It was also suggested to incorporate a reference to the "manifest" nature of the conflict with a norm of fundamental importance to the domestic law of the State.

398. Concerning the question of who was mandated to formulate a unilateral act, a view was expressed that such capacity should be limited to those persons mentioned in article 7, paragraph 2 (a), of the Vienna Convention, though another view considered it necessary to look at the relevant State practice in order to determine if other organs could bind States in specific areas.

399. The question was raised as to whether an organ that acted beyond its powers or contravened its instructions nevertheless bound the State internationally in so doing; based on article 7 of the articles on State responsibility, the answer was in the affirmative. Therefore draft article 5 (h) needed to be considered in much greater detail since its very principle was open to question. Furthermore, it was stated that the same point was true, *a fortiori*, of the issue of specific restrictions on authority to express the consent of a State, dealt within article 47 of the Vienna Convention; the Special Rapporteur had not provided reasons for not transposing it to the case of unilateral acts.

400. However, according to another view, there was no need to make reference to the draft articles on State responsibility because the issue was not responsibility, but an expression of will that was binding on the State and which could not be formulated simply by an official of the State.

401. Furthermore, it was pointed out that only the author State could challenge the competence of the person who had formulated the unilateral act; it was not clear if other States could invoke that argument.

402. As for the provisions concerning error, fraud, corruption and coercion, the view was expressed that further thought should be given to their formulation, with fuller account taken of the wealth of State practice that was available in that area.

403. Some members agreed that in the interpretation of unilateral acts, the essential criterion was the author State's intention and that it might be useful to consult the preparatory work, where available. In this connection, it was noted that reference to preparatory work was made only in the context of a supplementary means of interpretation and was put in square brackets in article (b), which showed that it was a minor consideration, whereas actually it was important and should be emphasized in the context of intention.

404. On the other hand, other members voiced their reservations regarding the reference to preparatory work, because in the case of unilateral acts, the feasibility of having access to such work was quite doubtful. Furthermore, it was mentioned that the restrictive interpretation of unilateral acts, for which the Special Rapporteur had made a case, was not reflected in the text of the draft articles.

405. It was suggested that the retention of the words "preamble and annexes", found in draft article (a), paragraph 2, might not be justified in light of the fact that they were not found frequently in unilateral acts. In this connection, it was also suggested that the provision could state that the context for the purpose of the interpretation of a unilateral act should comprise the text and, where appropriate, its preamble and annexes. A similar approach should be taken with regard to the reference to preparatory work in article (b).

406. A suggestion was made for simplifying the approach by having a broad general rule on the interpretation of unilateral acts which would relegate to the commentary details such as the use of preambles and preparatory work, on the understanding that it might later be necessary to draft rules of interpretation that were specific to certain categories of acts.

407. It was also suggested that, in light of the diversity of State practice, it might be preferable to proceed on a case-by-case basis rather than trying to establish any common, uniform rule of interpretation.

408. Another proposal called for the Commission to look at the object and purpose of unilateral acts as a guide to the interpretation thereof. According to another view, the consideration of the interpretation of unilateral acts was premature.

409. In relation to draft article 7, which stated that a unilateral act was binding in nature, it was noted that such a provision could not serve as a general rule, in that it could not necessarily be said that protest, for example, was binding on the State which formulated it.

3. Special Rapporteur's concluding remarks

410. The Special Rapporteur noted that various trends had taken shape during the debate. For some members, it was impossible to codify rules on unilateral acts. For other members, the topic was very difficult and the approach adopted would have to be reviewed if progress was to be made. Still others had said that, although they had some doubts, they thought that the subject matter was codifiable and that rules had to be established in order to guarantee legal relations between States.

411. The Special Rapporteur indicated that he shared the view of the vast majority of members which believe that unilateral acts did indeed exist, that they were a well-established institution in international law and that they could be binding on the author State, subject to certain conditions of validity. In his view, unilateral acts are not a source of law, within the meaning of article 38 of the Statute of the International Court of Justice, but they could however constitute a source of obligations. He pointed out that there was jurisprudence of the International Court of Justice on unilateral acts, for example, in the *Nuclear Tests* case, the *Temple of Preah Vihear* case and the *Fisheries Jurisdiction* case.

412. As regards the concern expressed by a member of the Commission about the lack of progress made on the topic over five years, the Special Rapporteur pointed out that no progress could be made until the Commission had reached a minimum agreement on how the topic was to be treated. This required both a theoretical and a practical approach. The Commission must consider the topic in depth and take account of the opinions of Governments. He agreed with the need to analyse relevant practice and therefore supported the proposal that a mechanism be set up to carry out a study of State practice with the possible assistance of an outside private institution. Nonetheless, he also recalled his past request for the members of the Commission to transmit information on their countries' practice.

413. While acknowledging the complexity of the topic, the Special Rapporteur agreed with the majority of the members of the Commission that work on it could continue if a consensus could be reached on certain points. His view was that the Commission could continue what had been started and go on to consider practice later. Consequently, there was no need for a pause or a total abandonment of the topic, since such a decision would contradict the Commission's earlier message to the international community that the security of international legal relations was important and that the codification of unilateral acts might help build confidence in such relations.

414. He therefore proposed that, in the first stage, a Working Group try to formulate rules that were common to all acts and then, subsequently, focus on the consideration of specific rules for a particular category of unilateral act, such as promise or recognition.

415. In relation to the possibility of drafting a provision defining a principle *acta sunt servanda*, the Special Rapporteur noted that such recognition would constitute a step forward in the codification of the rules applicable to unilateral acts. The need to formulate a rule on the binding nature of unilateral acts had been made in addendum 2 to his fifth report and he felt that the issue merited further study by a Working Group.

416. With regard to the issue of whether or not reciprocity was required, the Special Rapporteur stated that, according to doctrine and jurisprudence, the main characteristic of unilateral acts was that, in order to be valid, they did not require acceptance or any other reaction by the other party in order to produce legal effects. Reciprocity must, moreover, be distinguished from the interest of the author State. In this connection, he also noted that reciprocity was not always present even in the conventional sphere, since a treaty could involve commitment without reciprocity.

417. In reply to the suggestion to restrict the study to two unilateral acts, namely, promise and recognition, due to the fact that general rules could not be formulated because the variety of possible subject matters was far too great, the Special Rapporteur felt that it was possible to draft common rules on the formulation and interpretation of unilateral acts; a unilateral act was a unilateral expression of will, which was the same in all cases, irrespective of its content or legal effects.

418. In relation to the view that attributed greater importance to the effects produced rather than the intention, he noted that in order to determine the legal effects of an act, it was first necessary to determine its nature and, accordingly, to determine the intention of the author of the act, and that involved an interpretation.

419. The Special Rapporteur expressed that the members of the Commission generally agreed that the definition of a unilateral act contained in draft article 1 could apply to all the acts in question; some doubts voiced on the use of the term "unequivocal" or on the need for a unilateral act to have been "known", as well as the proposal for broadening the category of addressees of a unilateral act could be dealt with in the Drafting Committee.

420. With regard to the persons authorized to act on behalf of the State and bind it at the international level, two trends of opinion had taken shape. One wanted to limit the capacity to formulate a unilateral act to very specific persons, including those referred to in article 7 of the 1969 Vienna Convention on the Law of Treaties, while the other considered that such capacity had to be extended to other persons, if not every person authorized by the State to formulate unilateral acts likely to affect other States. In this connection, he noted that the reference made, in paragraph 93 of his fifth report, to articles 7 to 9 of the articles on State responsibility for internationally wrongful acts, meant that the extension of responsibility provided for in those articles or in article 3 was not valid or applicable in the case of unilateral acts because the two subject matters had evolved differently in international law and the considerations to be taken into account were also different.

421. Some members had indicated a preference for not distinguishing between absolute invalidity and relative invalidity of unilateral acts, while others had been of the opinion that such a distinction might be useful. In his own opinion, the concept of "absolute" or "relative" invalidity played an important role in determining who could invoke the invalidity of an act.

422. With regard to draft article 5 (a) to (h) on causes of invalidity of unilateral acts, he agreed with members who had rightly pointed out that the word "consent" referred to the law of treaties and therefore did not belong in the context of unilateral acts, as well as with the suggestion that account should also be taken of article 64 of the Vienna Convention, which related to the

emergence of a new peremptory norm of general international law. Referring to the invalidity of a unilateral act as a result of non-conformity with a decision of the Security Council, he suggested that perhaps only those decisions adopted under Articles 41 and 42 of the Charter be taken into account.

423. Some members of the Commission had referred to the invalidity of a unilateral act as a result of non-conformity with an earlier obligation assumed by a State either conventionally or unilaterally. In his own view, that would not be a case of the invalidity of the act or of a defect of validity, but a case of conflict of rules, which was governed by the Vienna regime in provisions that were different from those relating to the invalidity of treaties.

424. Noting that the use of the word "invoke" in the text of the draft articles had been considered unnecessary, he recalled that that term appeared in the corresponding provisions of the 1969 and 1986 Vienna Conventions. In the text under consideration, it referred to the possibility that a State could invoke a cause of invalidity, the invocation of invalidity being something different.

425. Contrary to the opinion of some members, the Special Rapporteur was of the view that the rules of interpretation were essential and should be considered at the present stage. Only interpretation made it possible to determine whether an act was unilateral, whether it was legal, whether it produced legal effects and thus bound the author State and whether it was not covered by other regimes such as the law of treaties. Moreover, it had been emphasized in the Commission and in the Sixth Committee that common rules of interpretation could apply to the unilateral acts.

426. With regard to rules of interpretation, comments had been made on the reference to the intention of the author State. He repeated that its interpretation must be done in good faith and in accordance with the terms of the declaration in their context, i.e. the text itself and its preamble and annexes. The determination of the intention of the author State was indispensable and could be deduced not only from the terms of the oral or written declaration, in the particular context and in accordance with specific circumstances, but also, when it was not possible to determine the meaning according to the general rule of interpretation, from additional means, such as the preparatory work. In order to cover the concerns expressed by some members on the difficulties raised on having access to preparatory work, the Special Rapporteur suggested inserting the phrase "when that is possible" in the draft article.

427. Some members had drawn attention to the need to refer explicitly in the text to the restrictive nature of interpretation; doing so might dispel fears that any act at all could be binding on the State or that the State might be bound by any act formulated by one of its representatives.

428. In the view of the Special Rapporteur, the draft articles on causes of invalidity and on interpretation should be referred to a Working Group so that it might determine whether provisions common to all acts could be formulated and then deal with the substantive questions raised.

429. In relation to the issue of whether a State could revoke a unilateral act which it had formulated, such as the recognition of a State, the Special Rapporteur was of the view that although the act was unilateral, the legal relationship established obviously was not and, therefore, a State which formulated an act of recognition would not be able to revoke it.

CHAPTER VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

A. Introduction

430. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur.[402]

431. The Commission, from its thirty-second (1980) to its thirty-sixth sessions (1984), received and considered five reports from the Special Rapporteur.[403] The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

432. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the

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[402] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

[403] For the five reports of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One) p. 247, document A/CN.4/334 and Add.1 and 2; *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360; *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373; *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

schematic outline[404] and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law".[405]

433. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza, Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-eighth session (1996).[406]

434. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.[407] On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992 decided to continue the work on this topic in stages. First to complete work on prevention of transboundary harm and to proceed with remedial measures.[408] The Commission decided that, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title.

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[404] *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

[405] *Yearbook ... 1985*, vol. II (Part One), Addendum, document A/CN.4/384. See also "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/471.

[406] For the 12 reports of the Special Rapporteur, see:

Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394;
Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402;
Yearbook ... 1987, vol. II (Part One), p. 47, document A/CN.4/405;
Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413;
Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423;
Yearbook ... 1990, vol. II (Part One), p. 83, document A/CN.4/428;
Yearbook ... 1991, vol. II (Part One), p. 71, document A/CN.4/437;
Yearbook ... 1992, vol. II (Part One), p. 75, document A/CN.4/443;
Yearbook ... 1993, vol. II (Part One), document A/CN.4/450;
document A/CN.4/459; document A/CN.4/468; and document A/CN.4/475 and Add.1.

[407] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10* (A/47/10), pp. 127-129.

[408] For a detailed recommendation of the Commission see ibid., *Fiftieth Session, Supplement No. 10* (A/50/10), pp. 196-198.

435. At its forty-eighth session (1996), the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations to the Commission.

436. The Working Group submitted a report[409] which provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.

437. At its forty-ninth session (1997), the Commission established again a Working Group to consider the question of how the Commission should proceed with its work on this topic. The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group further noted that the Commission had dealt with two issues under the topic: "prevention" and "international liability". In the view of the Working Group, these two issues were distinct from one another, though related. The Working Group therefore agreed that henceforth the issues of prevention and of liability should be dealt with separately.

438. Accordingly the Commission decided to proceed with its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[410] The General Assembly took note of this decision in paragraph 7 of its resolution 52/156. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[411]

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[409] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/51/10), annex I.

[410] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 168.

[411] Ibid.

439. At its fifty-third session (2001), the Commission adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities,[412] thus concluding its work on the first part of the topic. Furthermore, the Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.

440. The General Assembly, in operative paragraph 3 of resolution 56/82, requested the Commission to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

B. Consideration of the topic at the present session

441. At the present session, the Commission resumed its consideration of the second part of the topic. At its 2717th meeting, on 8 May 2002, the Commission established a Working Group. At its 2743rd and 2744th meetings, on 8 and 9 August 2002, the Commission considered and adopted the report of the Working Group,[413] as amended by the Commission, which is reproduced in section C below. Furthermore, the Commission appointed Mr. Pemmaraju Sreenivasa Rao as Special Rapporteur for the topic.

C. Report of the Working Group

442. At the current session, the Commission established a Working Group,[414] chaired by Mr. Pemmaraju Sreenivasa Rao, which held seven meetings, on 27 and 30 May, on 23, 24 and 29 July and on 1 August 2002.

443. In light of the fact that the Commission completed the draft articles on prevention, the Working Group started consideration of the second part of the topic, in accordance with operative paragraph 3 of General Assembly resolution 56/82. It was also significant that the Commission had completed its work on State responsibility. It was understood that failure to perform duties of prevention addressed to the State in terms of the earlier draft articles on prevention entails State responsibility.

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[412] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 97.

[413] A/CN.4/L.627.

[414] For the membership of the Working Group see paragraph 10 above.

444. The Working Group, recognizing that harm could occur despite faithful implementation of the duties of prevention and for the purpose of the examination of the remainder of the topic, assumed that such duties have been fulfilled. Harm in such cases could occur for several reasons not involving State responsibility, such as situations where the preventive measures were followed but in the event prove inadequate or where the particular risk that causes harm was not identified at the time and appropriate preventive measures were not taken.

445. In case harm occurs despite compliance by the State with its duties, international liability would arise. Accordingly, it was important that the task of the Commission in addressing the remainder of the topic concerning significant transboundary harm arising out of hazardous activities was better dealt with as allocation of loss among different actors involved in the operations, such as, for instance, those authorizing, managing or benefiting from them. They could, for example, share the risk according to specific regimes or through insurance mechanisms.

446. It was generally recognized that States should be reasonably free to permit desired activities within their territory or under their jurisdiction or control despite the possibility that they may give rise to transboundary harm. However, it was equally recognized that they should ensure that some form of relief, for example compensation, be made available if actual harm occurs despite appropriate preventive measures. Otherwise, potentially affected States and the international community are likely to insist that the State of origin prevent all harm caused by the activity in question, which might result in the activities themselves having to be prohibited.

1. Scope

447. The Working Group reviewed different possibilities to cover the scope of the topic. In this connection, it recognized that harm arising out of creeping pollution and pollution from multiple sources or harm done to the environment in the areas beyond national jurisdiction have their own particular features. For that reason, the Working Group recommended to continue to limit the scope of the remainder of the topic to the same activities which were covered under the topic of prevention. Such an approach would also effectively link the present exercise to the previous one and complete the topic.

448. As regards the scope, it is understood that:

(i) Activities covered are the same as those included within the scope of the topic on prevention of transboundary harm from hazardous activities;

(ii) A threshold would have to be determined to trigger the application of the regime on allocation of loss caused;[415]

(iii) Loss to (a) persons (b) property, including the elements of State patrimony and national heritage, and (c) environment within the national jurisdiction should be covered.

2. Role of the operator and of the State in the allocation of loss

449. The Working Group had a preliminary exchange of views on the different models and rationales to bring about or justify different ways to allocate loss among the relevant actors.

450. There was agreement on certain considerations. First, the innocent victim should not, in principle, be left to bear the loss. Secondly, any regime on allocation of loss must ensure that there are effective incentives for all involved in a hazardous activity to follow best practice in prevention and response. Thirdly, such a regime should cover widely the various relevant actors, in addition to States. These actors include private entities such as operators, insurance companies and pools of industry funds. In addition, States play an important role in devising and participating in loss-sharing schemes. Much of the topic would have to do with the detailed distribution of loss between such actors. In the debates, the following considerations were highlighted.

(a) The role of the operator

451. The operator, having direct control over the operations, should bear the primary liability in any regime of allocation of loss. The operator's share of loss would involve costs that it needs to bear to contain the loss upon its occurrence, as well as the cost of restoration and compensation. In arriving at these costs, particularly the cost concerning restoration and

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[415] There were different views in the Working Group on this issue. One view is that "significant harm" be retained as a trigger. The other view is that this threshold, while suitable for the prevention regime, was inappropriate and therefore a higher threshold was necessary for the current endeavour.

compensation, the considerations concerning compliance with the duties of prevention and proper management of the operation would be relevant. Other considerations, like third party involvement, force majeure, non-foreseeability of the harm, and non-traceability of the harm with full certainty to the source of the activity, would also need to be kept in view.

452. The Working Group also considered the usefulness of developing proper insurance schemes, having mandatory contributions to funding mechanisms by the operators belonging to the same industry and having the State earmark funds to meet emergencies and contingencies arising from significant harm resulting from hazardous activities.

453. It was also recognized that the insurance industry does not always cover harm arising out of many hazardous activities, particularly those which are considered to be ultra-hazardous. In such cases, the practice of States providing national funding or incentives for such insurance to be available is to be noted. In this regard, some States have undertaken to promote suitable insurance schemes with appropriate incentives.

454. In any regime on allocation of loss, the operator's share cannot be conceived to be full and exhaustive if the costs of restoration and compensation exceed the limits of available insurance or his own resources, which are necessary for his survival as an operator. Accordingly, the operator's share of loss in case of major incidents could be limited. It was also noted that the operator's share would generally be limited where his liability to pay is either strict or absolute. The remainder of the loss then would have to be allocated to other sources.

(b) The role of the State

455. The Working Group discussed the role of the State in the sharing of the loss arising out of harm caused by hazardous activities. It was agreed that States played a crucial role in designing appropriate international and domestic liability schemes for the achievement of equitable loss allocation. In this connection, a view was expressed that these schemes should be devised to ensure that operators internalize all the costs of their operations and, accordingly, that it should be unnecessary for public funds to be used to compensate for loss arising from such hazardous activities. In case the State itself acted as an operator, it too should be held liable under such schemes. However, it was also agreed that cases might arise when private liability might prove insufficient for attaining equitable allocation. The position was then expressed by some members of the Working Group that the remainder of the loss should in such cases be allocated

to the State. Other members felt that while that alternative could not be completely excluded, any residual State liability should arise only in exceptional circumstances. It was noted that in some cases, as in the case of damage caused by space objects, States have accepted a primary liability.

456. The Working Group also discussed the problem that would arise if there were to be residual State liability for transboundary harm caused by hazardous activities: in such case it was not self-evident which State should participate in loss-sharing. In some cases the State of origin might be held liable. It was pointed out that the State authorizing and monitoring the operation, or receiving benefits from it, should also participate in bearing the loss. In other cases liability might fall on the State of nationality of the relevant operator. The degree of State control, as well as the role of the State as a beneficiary of the activities, might be taken into account when determining the State's role in loss allocation.

3. Additional issues

457. Matters for consideration in this area include inter-State or intra-State mechanisms for consolidation of claims, issues arising out of the international representation of the operator, the processes for assessment, quantification and settlement of claims, access to the relevant forums and the nature of available remedies.

CHAPTER VIII

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

458. At its fifty-second session, in 2000, the Commission decided to include the topic of "Responsibility of international organizations" in its long-term programme of work.[416]

459. The General Assembly, in resolution 55/152 of 12 December 2000, in paragraph 8, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus on the new topic annexed to the Commission's 2000 report.

460. The General Assembly, in paragraph 8 of resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations", having due regard to comments made by Governments.

B. Consideration of the topic at the present session

461. At the present session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work.

462. At the same meeting, the Commission established a Working Group on the topic.[417]

463. The Commission further decided, at the same meeting, to appoint Mr. Giorgio Gaja as Special Rapporteur for the topic.

464. At its 2740th meeting, held on 2 August 2002, the Commission considered and adopted the report of the Working Group which is produced in section C below.

C. Report of the Working Group

1. The scope of the topic

(a) The concept of responsibility

465. The Commission used the term "responsibility" in the articles on "Responsibility of States for Internationally Wrongful Acts" [hereinafter, State responsibility] with reference to the consequences under international law of internationally wrongful acts. It is to be assumed that the meaning of "responsibility" in the new topic at least comprises the same concept. Thus, the study should encompass responsibility which international organizations incur for their wrongful acts. The scope should reasonably cover also related matters which were left aside in the articles

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[416] *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), chap. IX.A.1, para. 729.

[417] For the membership of the Working Group see paragraph 10 above.

on State responsibility: for instance, as was said in paragraph (4) of the commentary on article 57, "cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization".[418]

466. The articles on State responsibility purport to establish only rules of general international law and leave aside "conditions for the existence of an internationally wrongful act" and questions regarding "the content or implementation of the international responsibility of a State" that "are governed by special rules of international law" (art. 55). A similar approach appears to be justified with regard to international organizations. This choice would not exclude the possibility that some indications for establishing general rules may be taken from "special rules" and the respective implementing practice. Likewise, general rules of international law may be of relevance for construing "special rules" of the organization.

467. The responsibility of international organizations may arise vis-à-vis member and non-member States. In the case of non-universal international organizations, responsibility may be more likely to occur in relation to non-member States. With regard to member States, the great variety of relations existing between international organizations and their member States and the applicability to this issue of many special rules - mostly pertaining to the relevant "rules of the organization" - in case of non-compliance of obligations by an international organization towards its member States or by the latter towards the organization will probably limit the significance of general rules in this respect. However, issues of responsibility for internationally wrongful acts should not be excluded from the study of the topic for the sole reason that they arise between an international organization and its member States.

468. Questions of responsibility of international organizations are often coupled with those concerning liability of the same organizations under international law, such as those concerning damage caused by space objects, for which international organizations may be liable according to article XXII (3) of the 1972 Convention on International Liability for Damage Caused by Space Objects and possibly also according to a parallel rule of general international law or by virtue of the operation of general principles of law. Issues of responsibility and liability are not infrequently intertwined, because damage may be caused in part by lawful activities and in part

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[418] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 362.

by the infringement of obligations of prevention or other obligations. However, since the Commission has made a separate topic of international liability, which is currently under examination, it seems preferable, for the time being, to defer consideration of questions of the liability of international organizations pending the outcome of the Commission's work in the context of that study, and not to consider such issues in the context of responsibility of international organizations.

(b) The concept of international organizations

469. Conventions adopted under the auspices of the United Nations restrict the meaning of the term international organizations to intergovernmental organizations, implying by these organizations that States have established by means of a treaty or exceptionally, as in the case of OSCE, without a treaty. Thus, for instance, article 2 (1) (i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations says that "'international organization' means an intergovernmental organization". This concept undoubtedly covers most entities for which issues of responsibility under international law are likely to occur. It is to be assumed that international law endows these international organizations with legal personality because otherwise their conduct would be attributed to their members and no question of an organization's responsibility under international law would arise.

470. The definition of international organizations given above comprises entities of a quite different nature. Membership, functions, ways of deliberating and means at their disposal vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all intergovernmental organizations, especially with regard to the issue of responsibility into which States may incur for activities of the organization of which they are members. It may be necessary to devise specific rules for different categories of international organizations.

471. Some international organizations like the World Tourism Organization have as members besides States also non-State actors. The study could include questions of responsibility arising with regard also to this type of organization. The responsibility of non-State members does not need to be examined directly, but one could take it into account insofar as it affects the responsibility of member States.

472. The topic would be considerably widened if the study were to comprise also organizations that States establish under municipal laws, for example under the law of a

particular State, and non-governmental organizations. Thus, it may seem preferable to leave questions of responsibility relating to this type of organization aside, at least provisionally.

2. Relations between the topic of responsibility of international organizations and the articles on State responsibility

473. The draft articles on responsibility of international organizations will formally have to be an independent text from the articles on State responsibility. This would not necessarily exclude the option of making in the new text a general reference to rules adopted in the context of State responsibility and of writing specific provisions for the issues that could not adequately be dealt with by means of such a reference or also of leaving some of these issues unprejudiced. This option would have the advantage of giving the opportunity of writing a relatively short text which would highlight the specific issues. However, in so doing one would run the risk of underestimating the specific aspects of the topic, especially in those cases in which there is little practice relating to international organizations. Some matters for which the articles on State responsibility reflect rules of customary international law with regard to States may only be the object of progressive development in respect of international organizations. Whichever way of drafting is chosen, the specific aspects of the topic will have to be considered with great care.

474. The situation cannot be entirely likened to the one which occurred with regard to the law of treaties. In that context, well before the Commission completed its work with regard to international organizations a codification convention concerning treaties between States had been adopted and had entered into force; moreover, the 1986 Vienna Conference came to the conclusion that the rules governing treaties of international organizations had in most respects to be aligned with those of the 1969 Convention. The ensuing result was the textual reproduction of many provisions of this Convention by the 1986 Convention. This could not escape the criticism that the exercise had been unnecessary: it would have been generally sufficient to say that what applied to States was deemed to apply also to international organizations. In the field of responsibility a different picture emerges. The articles concerning States have been recommended to the attention of States by the General Assembly, but a decision on future action on them has been postponed. Arguably, the issues that are specific to the responsibility of

international organizations are more numerous than with regard to treaties. Thus the drafting of a comprehensive text is more justified, at least for the time being, in the case of responsibility than in the case of the law of treaties.

475. Given the quality of the results of the lengthy work completed by the Commission in the year 2001 and also the need for keeping some coherence in the Commission's output, articles on State responsibility will have to be taken constantly into consideration. They should be regarded as a source of inspiration, whether or not analogous solutions are justified with regard to international organizations. The more precise identification of what is specific to international organizations as well as the developments concerning the articles on State responsibility will show whether a reference to rules applying to States could be adequately made with regard to part of the topic. If the initial work of the Commission on responsibility of international organizations addresses matters which are undoubtedly specific, the risk of having to redraft part of the text will anyway be minimized.

3. Questions of attribution

476. One of the questions which have been mostly considered in practice with regard to the responsibility of international organizations concerns the attribution of wrongful conduct either to an organization or to its member States or to some of them; in certain cases attribution could conceivably be made both to an organization and to its member States. The commentary on article 57 of the articles on State responsibility noted that "[...] article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e., for conduct attributable to it under Chapter II of Part One, not being conduct performed by an organ of an international organization".[419] However, the quoted passage of the commentary does not imply that conduct taken by a State organ will be necessarily attributed to the State, as would appear from article 4. An exception is mentioned in the commentary for the case that "a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributed to the organization, not the sending State, and will fall outside the scope of the articles".[420]

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[419] Ibid., p. 363.

[420] Ibid., p. 361.

477. The case in which a State organ is "lent" to an international organization is not the only one which raises the question of whether conduct of a State organ is to be attributed to the State or to the organization. One may have to consider also the cases in which the conduct of a State organ is mandated by an international organization or takes place in an area that falls within an organization's exclusive competence. For example, Annex IX of the United Nations Convention on the Law of the Sea states in article 5 (1) that an organization and its member States are required to make, when acceding to the Convention, "a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention"; according to article 6 (1), "Parties, which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or any other violation of this Convention." There is clearly the need for a deeper study of these questions than was made at the time of writing the commentary on article 57 on State responsibility.

4. Questions of responsibility of member States for conduct that is attributed to an international organization

478. The question whether States may be responsible for the activities of international organizations of which they are members is probably the most contentious issue of the topic under consideration. As it is partly linked to the question of attribution, it may be preferable to deal with it in immediate sequence. Some cases of member States' responsibility find a parallel in Chapter IV of Part One of the articles on State responsibility. This chapter, which concerns relations between States, only considers instances in which one State aids or assists, directs and controls, or coerces another State over the commission of an internationally wrongful act. Member States' responsibility may be engaged under further circumstances. As has already been noted, the different structure and functions of international organizations may lead to diversified solutions to the question now under consideration.

479. When States are responsible for an internationally wrongful act for which an international organization of which they are members is also responsible, it is necessary to inquire whether there is a joint or a joint and several responsibility or whether the member States' responsibility is only subsidiary.

480. One question that has given rise to practice, albeit limited, and which would probably have to be considered, concerns member States' responsibility in case of non-compliance with obligations that were undertaken by an international organization which was later dissolved. On

the other hand, the question of succession between international organizations raises several issues that do not appear to fall within the topic of responsibility of international organizations and could be left aside.

5. Other questions concerning the arising of responsibility for an international organization

481. The articles on State responsibility provide a model for the structure of the remaining parts relating to the arising of responsibility for international organizations. One would thus successively have to consider questions relating to the breach of international obligations, to the responsibility of an organization in connection with the acts of another organization or a State and to circumstances precluding wrongfulness, including waivers as a form of consent.

482. Should one consider that the conduct of an organ of a State is attributed to the same State even when conduct is mandated by an international organization, the issue whether the organization is responsible in this case would have to be considered together with the instances of aid or assistance, direction and control, or coercion of a State by an organization over the commission of an internationally wrongful act.

6. Questions of content and implementation of international responsibility

483. Parts Two and Three of the articles on State responsibility only concern the content of a State's responsibility towards another State and the implementation of responsibility in the relations between States. Article 33 (2) says that Part Two "is without prejudice to any right, arising from international responsibility of a State, which may accrue directly to any person or entity other than a State". Although the commentary on article 33 does not specifically refer to international organizations, it is clear that they may be considered entities other than States towards which a State is responsible.

484. It seems logical to extend the study to the legal consequences of internationally wrongful acts of an international organization. This is what is called "content of the international responsibility" in the articles on State responsibility. If the new draft articles follow a pattern similar to the one taken in Part Two of the articles on State responsibility, it would not be necessary to specify whether the rights corresponding to the responsible organization's obligations pertain to a State, another organization or a person or entity other than a State or organization.

485. As the new topic relates to the responsibility of international organizations, it does not include issues relating to claims that international organizations may put forward against States. However, insofar as it covers claims that international organizations may make against other organizations, some of the issues concerning claims against States would be covered if only by analogy. Implementation of an organization's responsibility would raise some specific problems if it covered also claims made by organizations. One may raise, for instance, the question whether an organization is entitled to invoke responsibility in case of infringements of obligations owed to the international community as a whole, or else whether organizations may resort to countermeasures. In the latter respect, one may also need to consider the respective roles of the organization and its member States in taking countermeasures. As has been previously noted, the solution of these questions would have implications with regard to claims that organizations may prefer against States. One would also have to consider who would be entitled to invoke responsibility on behalf of the organization. Given the complexity of some of these issues, it may be wise, at this stage, to leave open the question whether the study should include matters relating to implementation of responsibility of international organizations and, in the affirmative, whether it should consider only claims by States or also claims by international organizations.

7. Settlement of disputes

486. The fact that the articles on State responsibility do not include provisions concerning the settlement of disputes would appear to indicate that a similar choice should be taken also with regard to the responsibility of international organizations. Should the General Assembly decide in the future to pursue the adoption of a convention for State responsibility, the issue would have to be reviewed. However, as the draft articles on responsibility of international organizations will be formally independent, it is unlikely, but not inconceivable that the path towards the convention is taken only with regard to the latter topic. Moreover, one argument in favour of considering the settlement of disputes concerning the responsibility of international organizations derives from the widely perceived need to improve methods for settling those disputes. At this stage the question whether provisions on the settlement of disputes should be drafted is best left in abeyance, without prejudice to their inclusion or not.

8. Practice to be taken into consideration

487. Some of the most well-known cases concerning the subsidiary responsibility of member States for conduct of an international organization relate to commercial contracts that the organization had concluded with private parties. The arising issues were mainly considered under municipal laws or general principles of law. This type of case raises issues that are of an entirely different nature from those pertaining to responsibility under international law: for instance, questions of the applicable law, of the existence of legislation implementing the constituent instrument of an international organization or of the organization's immunity. Thus, there would be little reason for extending the study of the responsibility of international organizations to issues of responsibility that do not arise under international law. However, the judicial or arbitral decisions in question do offer some elements of interest for the study of responsibility under international law. For instance, Lord Oliver's and Lord Templeman's opinions in the 1989 judgment by the House of Lords in *J.H. Rayner Ltd. v. Department of Trade* (81 *International Law Reports* 670) contain some incidental comments on issues pertaining to member States' responsibility under international law; moreover, arguments developed with regard to municipal laws may offer a few useful elements for an analogy. Judicial and arbitral decisions concerning commercial contracts should be considered under the latter perspective.

9. Recommendation of the Working Group

488. Given the importance of having access to hitherto unpublished materials, the Working Group recommended that the Secretariat approach international organizations with a view to collecting relevant materials, especially on questions of attribution and of responsibility of member States for conduct that is attributed to an international organization.

CHAPTER IX

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

A. Introduction

489. Following its consideration of a feasibility study[421] that had been undertaken on the topic of "risks ensuring from fragmentation of international law", the Commission, at its fifty-second session, in 2000, decided to include the topic in its long term programme of work.[422]

490. The General Assembly, in resolution 55/152 of 12 December 2000, in paragraph 8, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus on the new topic annexed to the Commission's 2000 report.

491. The General Assembly, in paragraph 8 of resolution 56/82 of 12 December 2001, requested the Commission to give further consideration to the topics to be included in its long-term programme of work, having due regard to comments made by Governments.

B. Consideration of the topic at the present session

492. At the present session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work.

493. At the same meeting, the Commission established a Study Group on the topic.[423]

494. At its 2741st and 2742nd meetings, held on 6 and 7 August 2002, the Commission considered and adopted the report of the Study Group as amended, which is produced in section C below. In so doing, the Commission, inter alia, decided to change the title of the topic to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".

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[421] G. Hafner, "Risks Ensuing from Fragmentation of International Law", *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), annex.

[422] *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), chap. IX.A.1, para. 729.

[423] For the membership of the Study Group see paragraph 10 above.

C. Report of the Study Group

1. Summary of discussion

(a) Support for study of the topic

495. One of the main questions that the Study Group considered was whether the topic of fragmentation of international law (understood as a consequence of the expansion and diversification of international law) was suitable for study by the Commission. While there appeared to be considerable uncertainty, at least initially, about the potential scope of the topic and the substance and format of a possible final result of the Commission's work, almost all members of the Study Group were strongly in favour of taking up the topic. There was a general feeling that further study of the topic was desirable and that this was an area where the Commission could provide useful guidance, at least in relation to specific aspects of the issue.

496. The Commission recognized from the beginning that this topic was different in nature.[424] However, the unique nature of the topic did not detract from the broad support for the Commission considering it.

497. There was agreement that fragmentation was not a new phenomenon. The view was expressed that international law was inherently a law of a fragmented world. Other members elaborated by stating that an increase in fragmentation was also a natural consequence of the expansion of international law. Therefore, the Study Group felt that the Commission should not approach fragmentation as a new development, as this could distract from the existing mechanisms that international law had developed to cope with the challenges arising from fragmentation.

498. The Study Group took note of the risks and challenges posed by fragmentation to the unity and coherence of international law, as discussed in the feasibility study undertaken in 2000 referred to in paragraph 489 above. The work of the Commission would have to be guided by the aim of countering such risks and challenges. On the other hand, the Study Group also thought it important to highlight the positive aspects of fragmentation. For example,

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[424] The topic was described in the Commission's 2000 report as being "different from other topics which the Commission had so far considered" (*Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), para. 731).

fragmentation could be seen as a sign of the vitality of international law. It was also suggested that the proliferation of rules, regimes and institutions might strengthen international law. The same was true of regional international law and institutions. Attention was drawn to the fact that the increasing scope of international law meant that areas that were previously unaddressed by international law were being addressed. Similarly, there were advantages in increased diversity of voices and a polycentric system in international law.

(b) Procedural issues

499. Regarding procedural issues some members questioned whether the topic fell within the Commission's mandate. However, most members thought that this concern was unfounded. Some members raised the issue of whether the Commission would have to seek further approval[425] of the General Assembly before taking up this topic. However, most members thought that in this case the necessary support of the Assembly could be obtained.

(c) Appropriate title

500. It was the general sense of the Study Group that the title of the topic, "Risks Ensuing from Fragmentation of International Law" was not entirely adequate because it depicted the phenomena described by the term "fragmentation" in too negative a light. However, the Study Group considered that fragmentation may include certain undesirable consequences of the expansion of international law into new areas.

(d) Methodology and format of work

501. Regarding methodology, there were wide-ranging ideas about how to approach such a broad topic. It was agreed that the subject was not suitable for codification in the traditional format of draft articles.

502. One suggested approach to the topic would be to focus on specific subject areas or themes. Along those lines it was recommended that the Commission identify certain areas where conflicting rules of international law existed, for example, extradition treaties and human rights norms, and, if possible, develop solutions for such conflicts. It was also suggested that the Commission take a more descriptive approach, confining work to an assessment of the seriousness of fragmentation of international law.

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[425] See paragraphs 490 and 491 above.

503. At the other end of the spectrum, a more exploratory approach was proposed, with the methodology not necessarily having to be clearly established at this stage. It was thought that such an approach was consonant with the unique nature of the topic, where an evolving methodology might be most appropriate.

504. The Study Group identified several areas that were not suitable for study by the Commission. It was stated that the problem could be conceptualized in different ways.

505. There was agreement in the Study Group that the Commission should not deal with questions of the creation or relationship among international judicial institutions. It was, however, considered that, to the extent that the same or similar rules of international law could be qualified and applied differently by judicial institutions, problems that may arise from such divergences should be addressed.

506. There was also agreement that drawing analogies to the domestic legal system may not always be appropriate. It was thought that such analogies introduced a concept of hierarchy that was not present on the international legal plane, and should not be superimposed. It was suggested that there was no well-developed and authoritative hierarchy of values in international law. In addition, there was no hierarchy of systems represented by a final body to resolve conflicts.

507. It was acknowledged that the Commission should not act as a referee in the relationships between institutions, and in areas of conflicting rules. On the other hand it was thought that it could usefully address issues of communication among such institutions.

508. It was suggested that the Commission organize, at a later stage, a seminar in order to address fragmentation and that it take a role as either participant or moderator of such a seminar. The purpose of the seminar would be to gain an overview of State practice as well as to provide a forum for dialogue and potential harmonization. According to another suggestion, the seminar would take place at the beginning of each annual session of the Commission. It was the view of the Group that such an undertaking would be consistent with Chapter Three of the Commission's Statute. Another proposal was to go beyond the idea of a seminar in terms of the Commission's role in facilitating coordination. More institutionalized and periodical meetings were envisaged

and it was pointed out that there was similar practice already existing, for example, the meetings of the Chairpersons of Human Rights Treaty Bodies and the annual meeting of legal advisers of States held at the United Nations during the sessions of the General Assembly.

509. It was proposed that research into existing coordination mechanisms, such as those referred to in paragraph 508 above, by way of a questionnaire, would be desirable.

(e) Suggestions as to the possible outcome of the Commission's work

510. The prevailing view in the Study Group was that the result of the Commission's work should be a study or research report, although there was not yet agreement on the exact format or scope of any such report. On this basis, the Commission would then decide on appropriate action.

2. Recommendations

511. In light of the discussion in the Study Group regarding the title of the topic (see paragraph 500 above), the Group proposed that it be changed to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".

512. The Study Group recommended that a series of studies on specific aspects of the topic be undertaken and presented to the Commission for its consideration and appropriate action. The purpose of such studies would be to assist international judges and practitioners in coping with the consequences of the diversification of international law. In this regard the following topics, among others, could be made the subject of study:

(*a*) The function and scope of the *lex specialis* rule and the question of "self-contained regimes";

(*b*) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community;

(*c*) The application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties);

(*d*) The modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties);

(*e*) Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.

The choice of the topics to be studied was guided by earlier work done by the Commission, for instance in the field of the law of treaties or of the responsibility of States for internationally wrongful acts. Thus, similar to the approach pursued on the topic of reservations to multilateral treaties, these studies would build upon and further develop such earlier texts. The effort should aim at providing what could be called a "toolbox" designed to assist in solving practical problems arising from incongruities and conflicts between existing legal norms and regimes.

513. It was proposed that, as a first step, the Chairman of the Study Group would undertake a study on the topic "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

CHAPTER X

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

514. At its 2713th meeting on 1 May 2002, the Commission established a planning group for the entire session.[426]

515. The Planning Group held six meetings. It had before it Section E "Other decisions and conclusions of the Commission", of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-sixth session.[427]

516. At its 2744th meeting on 9 August 2002, the Commission considered and endorsed the report of the Planning Group.

1. New Topics

517. On 1 May 2002, the Commission decided:

- the inclusion on the Programme of work of the Commission of the item "International liability for injurious consequences arising out of acts not prohibited by international law" and the establishment of a Working Group on this topic;
- the inclusion on the Programme of work of the Commission of the item entitled "Responsibility of international organizations", appointment of a Special Rapporteur on this item and establishment of a Working Group to assist the Special Rapporteur during this session of the Commission.

518. On 6 May 2002, the Commission decided:

- the inclusion on the Programme of work of the Commission of the item entitled "Shared natural resources", appointment of a Special Rapporteur on this item and establishment of a Working Group to assist the Special Rapporteur;
- the inclusion on the Programme of work of the Commission of the item entitled "The risk of the fragmentation of international law"[428] and the establishment of a Study Group on this topic.

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[426] For the composition of the Planning Group, see paragraph 7 above.

[427] Document A/CN.4/521.

[428] Current title: "*Fragmentation of international law: difficulties arising from the diversification and expansion of international law*".

519. The Commission also decided to appoint at its 2717th meeting on 8 May 2002 Mr. Giorgio Gaja as Special Rapporteur for the topic "Responsibility of international organizations" and at its 2727th meeting on 30 May 2002, Mr. Chusei Yamada as Special Rapporteur for the topic "Shared natural resources" and at its 2743rd meeting on 8 August 2002, Mr. P.S. Rao as Special Rapporteur for the topic "International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)".

2. Work programme of the Commission for the remainder of the quinquennium

520. Since this is the first year of the quinquennium and following its usual practice the Commission found it useful to establish a work programme for the ensuing four years setting out in general terms the goals with respect to each topic to be achieved during this period. It is the understanding of the Commission that this work programme has a tentative character since the nature and the complexities of the work preclude any certain prediction a long time in advance.

Work programme (2003-2006)

2003:

Reservations to treaties

Eighth report of the Special Rapporteur on validity of reservations.

Diplomatic protection

Fourth report of the Special Rapporteur on nationality of corporations.

Unilateral acts of States

Sixth report of the Special Rapporteur on general rules applicable to unilateral acts (conclusion of first part).

Responsibility of international organizations

First report of the Special Rapporteur on the scope of the study and on attribution of conduct.

Shared natural resources

First report on outline.

International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

Further development of the conceptual outline of the topic.

Fragmentation of international law: difficulties arising from the diversification and expansion of international law

First report (paper) on International legal ways and means to deal with fragmentation (e.g. on *lex specialis* and "self-contained regimes").

2004:

Reservations to treaties

Ninth report of the Special Rapporteur on Effects of reservations and of objections to reservations.

Diplomatic protection

Fifth report on miscellaneous outstanding matters and completion of the first reading on Diplomatic protection. Adoption of draft articles and commentaries thereto on first reading.

Unilateral acts of States

Seventh report of the Special Rapporteur on specific rules applicable to certain unilateral acts (second part).

Responsibility of international organizations

Second report of the Special Rapporteur on the question of the responsibility of member States for conduct attributed to international organizations.

Shared natural resources

Second report on confined groundwater.

International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

To be determined at a later stage.

Fragmentation of international law: difficulties arising from the diversification and expansion of international law

Second report (paper) on International legal ways and means to deal with fragmentation (e.g. on Vienna Convention on the Law of Treaties rule on interpretation of treaties in light of applicable general International Law).

2005:

Reservations to treaties

Tenth report of the Special Rapporteur on Succession of States in respect of reservations. "Toilette finale" of the guidelines and adoption on first reading.

Diplomatic protection

Comments by Governments on draft articles and commentaries thereto on first reading.

Unilateral acts of States

Eighth report of the Special Rapporteur on rules applicable to unilateral acts not referred to in the seventh report.

Responsibility of international organizations

Third report of the Special Rapporteur on residual matters concerning the arising of responsibility for international organizations.

Shared natural resources

Third report on oil and gas.

International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

To be determined at a later stage.

Fragmentation of international law: difficulties arising from the diversification and expansion of international law

Third report (paper) on International legal ways and means to deal with fragmentation (e.g. on application of successive treaties and modification of multilateral treaties *inter se*).

2006:

Reservations to treaties

Second reading.

Diplomatic protection

Sixth report dealing with comments of Sixth Committee and Governments and adoption of draft articles and commentaries thereto on second reading.

Unilateral acts of States

Adoption of the draft articles and commentaries thereto on first reading.

Responsibility of international organizations

Fourth report of the Special Rapporteur. Adoption of draft articles and commentaries thereto on first reading.

Shared natural resources

Fourth report on comprehensive review.

International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

To be determined at a later stage.

Fragmentation of international law: difficulties arising from the diversification and expansion of international law

Fourth (final) report (paper) on practical role of ILC.

3. Long-term programme of work

521. On 1 May 2002, the Planning Group decided to reconstitute its Working Group on the Long-term programme and appointed Professor Pellet as Chairman of this Working Group.[429] The Working Group met on 31 July 2002, and the Chairman made a progress report orally to the Planning Group on 1 August 2002. Its work has at this stage a preliminary character.

4. Procedures and methods of work

522. The Commission considered various proposals on issues relating to procedural aspects of the work of the Commission. It discussed in particular a proposal which had already been presented at the fifty-third session of the International Law Commission. The proposal was composed of three aspects pertaining to a system of partial renewal of the Commission, to the observance of improved attendance at the ILC to measures for a more balanced gender representation among ILC members. Another proposal related to the rotation of geographical distribution of seats in the Bureau. These proposals were discussed in depth but finally it was felt that they would be extremely difficult to implement in practical terms, in addition to various sensitive political issues that they might raise. Consideration was also given to an oral proposal concerning continued improvement of informal discussions between the members of the Commission attending sessions of the General Assembly as referred to in paragraph 12 of resolution A/56/62.

523. The Commission also considered the mechanism of short, thematic debates or exchange of views in the Plenary on particular issues or questions raised in the course of the consideration of a topic, the so-called "mini-debates". The Commission is of the view that the "mini-debates" were useful and constitute an important innovation in the recent working methods of the Commission. They should however be kept brief and focused and not be abused in the sense of allowing speakers to make long statements falling outside the scope of the mini-debate.

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[429] For the membership see paragraph 11 above.

5. Cost-saving measures

524. With regard to paragraph 10 of General Assembly resolution 56/82 encouraging the Commission, at its future sessions, to continue taking cost-saving measures in organizing its programme of work, the Commission wishes to note that it is making every effort aiming towards the most cost-effective and economical way to conduct its work. The Commission considers that the shortening of its current and next (fifty-fifth) sessions to 10 weeks represented a significant cost-saving measure. The Commission also intends, once it returns to its sessions of 12 weeks' duration, to consider organizing its work in a manner similar to that it applied at its fifty-third session.

6. Honoraria

525. The Commission noted that after the date on which members were appointed to their position the General Assembly adopted resolution A/56/272 which reduced the honoraria payable to them and to members of certain other bodies.

526. The Commission draws attention to the point made in the Report of the Secretary-General (document A/53/643) that the level of the honoraria had not been reviewed since 1981 and that the decision of the General Assembly was taken in direct contradiction to the conclusions and recommendations in that report to the effect that the honoraria should be reviewed.

527. The Commission notes that the decision by the General Assembly was taken without consultation with the Commission and considers that the decision is not consistent in procedure or substance with either the principles of fairness on which the United Nations conducts its affairs or with the spirit of service with which members of the Commission contribute their time and approach their work.

528. Moreover, the Commission feels compelled to stress that the above resolution especially affects Special Rapporteurs, in particular those from developing countries, as it compromises the support for their research work.

529. The Commission decided to bring its concerns to the attention of Member States in the hope that the above-mentioned resolution will be duly reconsidered.

530. The members of the Commission, concerned about the administrative costs involved in the payment of the current symbolic honoraria, also decided that they would not collect them.

531. The Commission recommended also that a letter from the Chairman of the International Law Commission containing the above be sent to the appropriate authorities.

B. Date and place of the fifty-fifth session

532. The Commission decided to hold a 10-week split session, which will take place at the United Nations Office in Geneva from 5 May to 6 June and from 7 July to 8 August 2003.

C. Cooperation with other bodies

533. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Orlando Rebagliati. Mr. Rebagliati addressed the Commission at its 2730th meeting on 5 June 2002 and his statement is recorded in the summary record of that meeting.

534. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Wafik Kamil. Mr. Kamil addressed the Commission at its 2738th meeting on 30 July 2002 and his statement is recorded in the summary record of that meeting.

535. At its 2739th meeting on 31 July 2002, Judge Guillaume, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it. An exchange of views followed. The Commission finds this ongoing exchange of views with the Court very useful and rewarding.

536. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law were represented at the present session of the Commission by Mr. Rafael Benítez. Mr. Benítez addressed the Commission at its 2744th meeting on 9 August 2002 and his statement is recorded in the summary record of that meeting.

537. On 4 May 2002, an informal exchange of views was held between members of the Commission and members of the legal services of the International Committee of the Red Cross on topics of mutual interest for the two institutions.

D. Representation at the fifty-seventh session of the General Assembly

538. The Commission decided that it should be represented at the fifty-seventh session of the General Assembly by its Chairman, Mr. Robert Rosenstock.

539. Moreover, at its 2750th meeting on 16 August 2002, the Commission requested Mr. J. Dugard, Special Rapporteur on "Diplomatic Protection", to attend the fifty-seventh session under the terms of paragraph 5 of General Assembly resolution 44/35.

E. International Law Seminar

540. Pursuant to General Assembly resolution 55/152, the thirty-eighth session of the International Law Seminar was held at the Palais des Nations from 21 May to 7 June 2002, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or posts in the civil service in their country.

541. Twenty-four participants of different nationalities, mostly from developing countries, were able to take part in the session.[430] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures and participated in working groups on specific topics.

542. The Seminar was opened by the Chairman of the Commission, Mr. Robert Rosenstock. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration, organization, and conduct of the Seminar.

543. The following lectures were given by members of the Commission:

Mr. Peter Tomka: "State responsibility"; Mr. Giorgio Gaja: "Reservations to Treaties"; Mr. Pemmaraju S. Rao: "International liability for injurious consequences arising out of acts not prohibited by international law"; Mr. Victor Rodriguez Cedeño: "Unilateral acts of States"; Mr. Ian Brownlie: "The work of the International Court of Justice"; Mr. Bruno Simma: "Human Rights and the International Law Commission"; and Mr. John Dugard: "Diplomatic protection".

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[430] The following persons participated in the thirty-eighth session of the International Law Seminar: Mr. Babafemi Akinrinade (Nigeria); Mrs. Marlene Aldred (Jamaica); Mr. Marc Araba (Benin); Mrs. Mama Aissata Bangoura (Guinea); Mr. Hee-Deok Choi (Republic of Korea); Mr. Luis Cieza Palo (Peru); Mr. Nebiyou Dagne (Ethiopia); Mrs. Anita Demeter (Hungary); Mr. Aasmund Eriksen (Norway); Mr. Sodnom Ganhuyag (Mongolia); Mr. Abdelmoneim Hassan (Sudan); Mrs. Ulrike Hiebler (Austria); Mrs. Franziska Isliker (Switzerland); Mr. Alireza Kazemi Abadi (Islamic Republic of Iran); Mr. Atip Latipulhayat (Indonesia); Mr. Ernest Makawa (Malawi); Mrs. Fernanda Millicay (Argentina); Mr. Alexander Orakhelashvili (Georgia); Mrs. Mateja Platise (Slovenia); Mrs. Maria Angela Ponce (Philippines); Mr. Ali Qazilbash (Pakistan); Mrs. Maria Sanglade Rodriguez (Venezuela); Mr. Drahoslav Stefanek (Slovakia); Mrs. Wenjuan Yin (China). A Selection Committee, under the Chairmanship of Professor Georges Abi-Saab (Honorary Professor, Graduate Institute of International Relations, Geneva), met on 4 April 2002 and selected 24 candidates out of 79 applications for participation in the Seminar.

544. Lectures were also given by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations: "The International Criminal Court and other United Nations ad hoc Tribunals"; Professor Gudmundur Eiriksson, Judge, International Tribunal for the Law of the Sea and former member of the International Law Commission: "The International Tribunal for the Law of the Sea"; Mr. Stéphane Jaquemet, Senior Legal Officer, Promotion of Refugee Law Section, UNHCR: "The Protection Mandate of UNHCR"; and Mr. Arnold Pronto, Associate Legal Officer, Office of Legal Affairs: "The work of the International Law Commission". A morning was devoted to a visit to the European Organization for Nuclear Research (CERN), at the invitation of its Legal Counsel, Ms. Eva Gröniger-Voss. The discussion focused on legal matters related to CERN.

545. The participants in the Seminar were assigned to one of three working groups for the study of the following particular topic under the guidance of Mrs. Paula Escarameia, member of the Commission and coordinator: "The Case of East Timor: Some Legal Aspects of the Road to Independence". Each group presented its findings to the Seminar. Participants were also assigned to other working groups, whose main task was to prepare the discussions following each lecture and submit written summary reports on those lectures. A collection of the reports was compiled and distributed to the participants.

546. Participants were also given the opportunity to make use of the facilities of the United Nations Library.

547. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama and Grand Council Rooms followed by a reception.

548. Mr. Robert Rosenstock, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, and Mr. Marc Araba, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the thirty-eighth session of the Seminar.

549. The Commission noted with particular appreciation that the Governments of Austria, Finland, the Federal Republic of Germany, Norway, Switzerland and the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed to award a sufficient number of fellowships to achieve adequate geographical distribution of participants and to bring from developing countries deserving candidates who would otherwise have been prevented from taking part in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 11 candidates and partial fellowship (covering subsistence only) to 7 candidates.

550. Of the 855 participants, representing 152 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 505 have received a fellowship.

551. The Commission stresses the importance it attaches to the sessions of the Seminar, which enable young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2003 with as broad participation as possible. It should be emphasized that, as there are fewer and fewer contributions, the organizers of the Seminar have had to draw on the reserve of the Fund this year. Should this trend continue, it is to be feared that the financial situation of the Fund will no longer allow as many fellowships to be awarded.

552. The Commission noted with satisfaction that in 2002 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services would be provided for the Seminar at the next session, despite existing financial constraints.